
Public Notice

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**U.S. Army Corps
of Engineers**

In Reply Refer To:

Buffalo District CELRB-CO-R RE: 98-05(4) Section: NY 10 and 404

**PUBLIC NOTICE FOR FEDERAL REGISTER NOTICE
ANNOUNCING NEW NATIONWIDE PERMITS
AND**

REGIONAL CONDITIONS FOR THE STATE OF NEW YORK

On 9 March 2000, the U.S. Army Corps of Engineers published a notice in Part III of the Federal Register Vol. 65, No. 47, pages 12818-12899, announcing the issuance of five new Nationwide Permits (NWP), the modification of six existing NWPs, the modification of nine NWP general conditions, and the adoption of two new NWP general conditions. These NWPs are activity-specific and authorize certain activities in non-tidal waters of the United States that have minimal adverse effects on the aquatic environment. The new NWP general conditions apply to all NWPs and limit the use of certain NWPs in designated critical resource waters and waters of the United States within 100-year floodplains. The rule became effective on 7 June 2000. In addition, the Buffalo District has developed Regional conditions which will provide additional protection for the aquatic environment by ensuring that the NWPs authorize only those activities with minimal adverse effects on the aquatic environment. Regional conditions will help ensure protection of high value waters within the District. The NWPs, including new, modified and unmodified, with general and regional conditions are attached to this notice.

In response to the 9 March 2000 Federal Register Notice, the New York State Department of Environmental Conservation (NYSDEC) issued Section 401 Water Quality Certification (WQC) for NWPs 3,7,12,14,39,40 with conditions, NWPs 27,41,42,43 without conditions, and denied WQC for NWP 44. These WQCs have been incorporated into the attached NWPs.

The New York State Department of State, Division of Coastal Resources, determined that the new and modified NWPs are not consistent with the New York State Coastal Management Program (CMP). Applicants wishing to utilize NWPs 27 or 39 within the entire CMP area or NWPs 3,12,14,40,42, and 43 within designated special management areas must obtain a project-specific consistency determination or waiver thereof from:

N.Y.S. Department of State

Division of Coastal Resources
& Waterfront Revitalization
41 State Street - 8th Floor
Albany, New York 12231-0001

These restrictions have been incorporated into the attached NWP's.

Some nationwide permits require advance notification to the Corps of Engineers. The notification must be in writing as early as possible prior to commencing the proposed activity. A checklist is attached to this notice to assist applicants in the preparation of a complete application and to ensure the information needed to review proposed projects is provided.

The 9 March 2000 Federal Register notice is available for viewing at the Buffalo District Corps of Engineers Regulatory Branch, 1776 Niagara Street, Buffalo, New York 14207-3199, or on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/>. As an alternative, World Wide Web users can access the Federal Register through the U.S. Government Printing Office at http://www.access.gpo.gov/su_docs/aces/aces140.html.

The Corps has also issued final decision documents for the new and modified NWP's. These documents are also available on the Internet at <http://www.usace.army.mil/inet/functions/cw/cecwo/reg/> and at Corps district offices. Furthermore, the NWP decision documents will be supplemented by Division Engineers to address decisions concerning regional conditioning of the NWP's.

Questions pertaining to the regional conditioning of the proposed Nationwide permits described in this notice should be directed to Bridget E. Brown, who can be contacted by calling (716) 879-4365, or by e-mail at: bridget.brown@usace.army.mil

Paul G. Leuchner
Chief, Regulatory Branch

A. INDEX OF THE NATIONWIDE PERMITS AND CONDITIONS.

(New and modified nationwide permits and conditions are identified by bold type within this index.)

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Waterbody

Regional Conditions

B. NATIONWIDE PERMITS AND CONDITIONS.

1. **Aids to Navigation.** The placement of aids to navigation and regulatory markers which are approved by and installed in accordance with the requirements of the U.S. Coast Guard. (See 33 CFR Part 66, Chapter I, Subchapter C). (Section 10)

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 1, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 1 until:

- 1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
- 2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 1; and,
- 3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

2. **Structures in Artificial Canals.** Structures constructed in artificial canals within principally residential developments where the connection of the canal to a navigable water of the United States has been previously authorized (see 33 CFR 322.5(g)). (Section 10)

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 2, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 2 until:

- 1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
- 2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 2; and,
- 3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

In addition, if the activities meet the following additional requirements, no consistency review by NYSDOS is necessary:

- 1. No structure may be placed in, on or over the waters of the canals, except for facilities that are used for or essential to water dependent activities.
- 2. Facilities that are used for or essential to water dependent activities shall (1) not be placed in a vegetated wetland or special aquatic site; (2) be limited to one structure per lot; and, (3) not extend more than 50 feet into the canal or a distance no greater than 25 percent of the width of the canal, whichever is less.
- 3. Shoreline stabilization structures (e.g. bulkheads, revetments, retaining walls) must be placed at or above the line of mean high water or ordinary high water.

3. **Maintenance.** Activities related to:

(i) The repair, rehabilitation, or replacement of any previously authorized, currently serviceable, structure, or fill, or of any currently serviceable structure or fill authorized by 33 CFR 330.3, provided the structure or fill is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification. Minor deviations in the structure's configuration or filled area, including those due to changes in materials, construction techniques, or current construction codes or safety standards which are necessary to make repair, rehabilitation, or replacement, are permitted, provided the adverse environmental effects resulting from such repair, rehabilitation, or replacement are minimal. Currently serviceable means useable as is or with some maintenance, but not so degraded as to essentially require reconstruction. This nationwide permit authorizes the repair, rehabilitation, or replacement of those structures or fills destroyed or damaged by storms, floods, fire, or other discrete events, provided the repair, rehabilitation, or replacement is commenced, or is under contract to commence, within two years of the date of their destruction or damage. In cases of catastrophic events, such as hurricanes or tornadoes, this two-year limit may be waived by the District Engineer, provided the permittee can demonstrate funding, contract, or other similar delays.

(ii) Discharges of dredged or fill material, including excavation, into all waters of the United States to remove accumulated sediments and debris in the vicinity of, and within, existing structures (e.g., bridges, culverted road crossings, water intake structures, etc.) and the placement of new or additional rip rap to protect the structure, provided the permittee notifies the District Engineer in accordance with General Condition 13. The removal of sediment is limited to the minimum necessary to restore the waterway in the immediate vicinity of the structure to the approximate dimensions that existed when the structure was built, but cannot extend further than 200 feet in any direction from the structure. The placement of rip rap must be the minimum necessary to protect the structure or to ensure the safety of the structure. All excavated materials must be deposited and retained in an upland area unless otherwise specifically approved by the District Engineer under separate authorization. Any bank stabilization measures not directly associated with the structure will require a separate authorization from the District Engineer.

(iii) Discharges of dredged or fill material, including excavation, into all waters of the United States for activities associated with the restoration of upland areas damaged by a storm, flood, or other discrete event, including the construction, placement, or installation of upland protection structures and minor dredging to remove obstructions in waters of the United States. (Uplands lost as a result of a storm, flood, or other discrete event can be replaced without a Section 404 permit provided the uplands are restored to their original pre-event location. This NWP is for the activities in waters of the United States associated with the replacement of the uplands.) The permittee must notify the District Engineer, in accordance with General Condition 13, within 12 months of the date of the damage and the work must commence, or be under contract to commence, within two years of the date of the damage. The permittee should provide evidence, such as a recent topographic survey or photographs, to justify the extent of the proposed restoration. The restoration of the damaged areas cannot exceed the contours, or ordinary high water mark, that existed prior to the damage. The District

Engineer retains the right to determine the extent of the pre-existing conditions and the extent of any restoration work authorized by this permit. Minor dredging to remove obstructions from the adjacent waterbody is limited to 50 cubic yards below the plane of the ordinary high water mark, and is limited to the amount necessary to restore the pre-existing bottom contours of the waterbody. The dredging may not be done primarily to obtain fill for any restoration activities. The discharge of dredged or fill material and all related work needed to restore the upland must be part of a single and complete project. This permit cannot be used in conjunction with NWP 18 or NWP 19 to restore damaged upland areas. This permit does not authorize the replacement of lands lost through gradual erosion processes.

Maintenance dredging for the primary purpose of navigation and beach restoration are not authorized by this permit. This permit does not authorize new stream channelization or stream relocation projects. Any work authorized by this permit must not cause more than minimal degradation of water quality, more than minimal changes to the flow characteristics of the stream, or increase flooding (See General Conditions 9 and 21). **(Sections 10 and 404)**

Note: This NWP authorizes the minimal impact repair, rehabilitation, or replacement of any previously authorized structure or fill that does not qualify for the Section 404(f) exemption for maintenance.

Nationwide Permit 3 Specific Regional Conditions:

1. The Pre-Construction Notification (PCN) (Nationwide Permit General Condition No. 13 - Notification) for activities involving the removal of accumulated sediments and debris in the vicinity of existing structures to restore the waterway to previously existing depths, must include evidence of such depths. If this information is not available, the PCN must include evidence of the existing depths immediately outside the proposed work area.

2. A PCN is required for any proposed repair, rehabilitation, or reconstruction of existing bulkheads that extend waterward more than eighteen (18) inches from the existing bulkhead. The PCN must include justification for a waterward extension exceeding eighteen (18) inches, such as geologic conditions, engineering requirements, etc.

3. For activities involving pouring of concrete into waters of the United States, the permittee must employ watertight forms. The forms shall be dewatered prior to the pouring of concrete.

4. A PCN is required for maintenance activities that involve discharges of dredged or fill material into waters of the United States for the purpose of creating temporary structures to facilitate work such as groins, work pads, laydown areas, cofferdams, staging areas or similar fills.

New York State Water Quality Certification for Nationwide Permit 3: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to maintenance activities associated with hydroelectric generating facilities.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 3, the following conditions shall apply in State designated Coastal Erosion Hazard Areas and the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 3 until:

- 1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
- 2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 3; and,
- 3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by DOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

4. **Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities.** Fish and wildlife harvesting devices and activities such as pound nets, crab traps, crab dredging, eel pots, lobster traps, duck blinds, clam and oyster digging; and small fish attraction devices such as open water fish concentrators (sea kites, etc.). This NWP authorizes shellfish seeding provided this activity does not occur in wetlands or sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year). This NWP does not authorize artificial reefs or impoundments and semi-impoundments of waters of the United States for the culture or holding of motile species such as lobster, or the use of covered oyster trays or clam racks. **(Sections 10 and 404)**

New York State Water Quality Certification for Nationwide Permit 4: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 4, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

5. **Scientific Measurement Devices.** Devices whose purpose is to measure and record scientific data such as staff gages, tide gages, water recording devices, water quality testing and improvement devices and similar structures. Small weirs and flumes constructed primarily to record water quantity and velocity are also authorized provided the discharge is limited to 25 cubic yards and further for discharges of 10 to 25 cubic yards provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. **(Sections 10 and 404)**

New York State Water Quality Certification for Nationwide Permit 5: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 5, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

6. **Survey Activities.** Survey activities including core sampling, seismic exploratory operations, plugging of seismic shot holes and other exploratory-type bore holes, soil survey and sampling, and historic resources surveys. Discharges and structures associated with the recovery of historic resources are not authorized by this NWP. Drilling and the discharge of excavated material from test wells for oil and gas exploration is not authorized by this NWP; the plugging of such wells is authorized. Fill placed for roads, pads and other similar activities is not authorized by this NWP. The NWP does not authorize any permanent structures. The discharge of drilling muds and cuttings may require a permit under Section 402 of the Clean Water Act. **(Sections 10 and 404)**

New York State Water Quality Certification for Nationwide Permit 6: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 6, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 6 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 6; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

7. Outfall Structures. Activities related to:

(i) construction of outfall structures and associated intake structures where the effluent from the outfall is authorized, conditionally authorized, or specifically exempted, or is otherwise in compliance with regulations issued under the National Pollutant Discharge Elimination System program (Section 402 of the Clean Water Act), and

(ii) maintenance excavation, including dredging, to remove accumulated sediments blocking or restricting outfall and intake structures, accumulated sediments from small impoundments associated with outfall and intake structures, and accumulated sediments from canals associated with outfall and intake structures, provided the activity meets all of the following criteria:

- a. The permittee notifies the District Engineer in accordance with General Condition 13;
- b. The amount of excavated or dredged material must be the minimum necessary to restore the outfalls, intakes, small impoundments, and canals to original design capacities and design configurations (i.e., depth and width);
- c. The excavated or dredged material is deposited and retained at an upland site, unless otherwise approved by the District Engineer under separate authorization; and
- d. Proper soil erosion and sediment control measures are used to minimize reentry of sediments into waters of the United States. The construction of intake structures is not authorized by this NWP, unless they are directly associated with an authorized outfall structure. For maintenance excavation and dredging to remove accumulated sediments, the notification must include information regarding the original design capacities and configurations of the facility and the presence of special aquatic sites (e.g., vegetated shallows) in the vicinity of the proposed work. **(Sections 10 and 404)**

Nationwide Permit 7 Specific Regional Condition

1. The PCN shall include measures to protect aquatic resources from known contaminants. Such measures shall include, but are not limited to isolating the area from the larger waterbody, using hydraulic dredging, etc.

New York State Water Quality Certification for Nationwide Permit 7: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to outfalls proposed for construction in any special aquatic sites, including wetlands.
2. This certification does not apply to the construction of any structures in tidal wetlands.
3. The applicant must provide the velocity in feet per second of the proposed intake and the name, drawings, and general operational information of any device that the applicant proposes to use to prevent impingement or entrainment of fish and wildlife.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide permit 7, DOS has waived the need for consistency concurrence.

8. Oil and Gas Structures. Structures for the exploration, production, and transportation of oil, gas, and minerals on the outer continental shelf within areas leased for such purposes by the Department of the Interior, Minerals Management Service. Such structures shall not be placed within the limits of any designated shipping safety fairway or traffic separation scheme, except temporary anchors that comply with the fairway regulations in 33 CFR 322.5(l). (Where such limits have not been designated, or where changes are anticipated, District Engineers will consider asserting discretionary authority in accordance with 33 CFR 330.4(e) and will also review such proposals to ensure they comply with the provisions of the fairway regulations in 33 CFR 322.5(l). Any Corps review under this permit will be limited to the effects on navigation and national security in accordance with 33 CFR 322.5(f)). Such structures will not be placed in established danger zones or restricted areas as designated in 33 CFR Part 334: nor will such structures be permitted in EPA or Corps designated dredged material disposal areas. **(Section 10)**

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 8, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 8 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 8; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

9. Structures in Fleeting and Anchorage Areas. Structures, buoys, floats and other devices placed within anchorage or fleeting areas to facilitate moorage of vessels where such areas have been established for that purpose by the U.S. Coast Guard. **(Section 10)**

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 9, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 9 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 9; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

10. Mooring Buoys. Non-commercial, single-boat, mooring buoys. (**Section 10**)

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 10, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

11. **Temporary Recreational Structures.** Temporary buoys, markers, small floating docks, and similar structures placed for recreational use during specific events such as water skiing competitions and boat races or seasonal use provided that such structures are removed within 30 days after use has been discontinued. At Corps of Engineers reservoirs, the reservoir manager must approve each buoy or marker individually. (**Section 10**)

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 11, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 11 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 11; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

12. Utility Line Discharges. Activities required for the construction, maintenance, and repair of utility lines and associated facilities in waters of the United States as follows:

(i) Utility lines: The construction, maintenance, or repair of utility lines, including outfall and intake structures and the associated excavation, backfill, or bedding for the utility lines, in all waters of the United States, provided there is no change in preconstruction contours. A "utility line" is defined as any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable, or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone, and telegraph messages, and radio and television communication (see Note 1, below). Material resulting from trench excavation may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary side casting not to exceed a total of 180 days, where appropriate. In wetlands, the top 6' to 12' of the trench should normally be backfilled with topsoil from the trench. Furthermore, the trench cannot be constructed in such a manner as to drain waters of the United States (e.g., backfilling with extensive gravel layers, creating a french drain effect). For example, utility line trenches can be backfilled with clay blocks to ensure that the trench does not drain the waters of the United States through which the utility line is installed. Any exposed slopes and stream banks must be stabilized immediately upon completion of the utility line crossing of each waterbody.

(ii) Utility line substations: The construction, maintenance, or expansion of a substation facility associated with a power line or utility line in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the activity does not result in the loss of greater than 1/2 acre of non-tidal waters of the United States.

(iii) Foundations for overhead utility line towers, poles, and anchors: The construction or maintenance of foundations for overhead utility line towers, poles, and anchors in all waters of the United States, provided the foundations are the minimum size necessary and separate footings for each tower leg (rather than a larger single pad) are used where feasible.

(iv) Access roads: The construction of access roads for the construction and maintenance of utility lines, including overhead power lines and utility line substations, in non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States. Access roads shall be the minimum width necessary (see Note 2, below). Access roads must be constructed so that the length of the road minimizes the adverse effects on waters of the United States and as near as possible to preconstruction contours and elevations (e.g., at grade corduroy roads or geotextile/gravel roads). Access roads constructed above preconstruction contours and elevations in waters of the United States must be properly bridged or culverted to maintain surface flows.

The term "utility line" does not include activities which drain a water of the United States, such as drainage tile or french drains; however, it does apply to pipes conveying drainage from another area. For the purposes of this NWP, the loss of waters of the United States includes the filled area plus waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Activities authorized by paragraphs (i) through (iv) may not exceed a total of 1/2 acre loss of waters of the United States. Waters of the United States temporarily affected by filling, flooding, excavation, or drainage, where the project area is restored to preconstruction contours and elevations, are not included in the calculation of permanent loss of waters of the United States. This includes temporary construction mats (e.g., timber, steel, geotextile) used during construction and removed upon completion of the work. Where certain functions and values of waters of the United States are permanently adversely affected, such as the conversion of a forested wetland to a herbaceous wetland in the permanently maintained utility line right-of-way, mitigation will be required to reduce the adverse effects of the project to the minimal level.

Mechanized landclearing necessary for the construction, maintenance, or repair of utility lines and the construction, maintenance, and expansion of utility line substations, foundations for overhead utility lines, and access roads is authorized, provided the cleared area is kept to the minimum necessary and preconstruction contours are maintained as near as possible. The area of waters of the United States that is filled, excavated, or flooded must be limited to the minimum necessary to construct the utility line, substations, foundations, and access roads. Excess material must be removed to upland areas immediately upon completion of construction. This NWP may authorize utility lines in or affecting navigable waters of the United States, even if there is no associated discharge of dredged or fill material (See 33 CFR Part 322).

Notification: The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:

- (a) Mechanized land clearing in a forested wetland for the utility line right-of-way;
- (b) A Section 10 permit is required;
- (c) The utility line in waters of the United States, excluding overhead lines, exceeds 500 feet;
- (d) The utility line is placed within a jurisdictional area (i.e., a water of the United States), and it runs parallel to a stream bed that is within that jurisdictional area;
- (e) Discharges associated with the construction of utility line substations that result in the loss of greater than 1/10 acre of waters of the United States;
- (f) Permanent access roads constructed above grade in waters of the United States for a distance of more than 500 feet; or

(g) Permanent access roads constructed in waters of the United States with impervious materials. (**Sections 10 and 404**)

Nationwide Permit 12 Specific Regional Conditions

1. Materials resulting from trench excavation for utility line installation which are temporarily sidecast into waters of the United States must be backfilled or removed within thirty (30) days of the date of their deposition.
2. This nationwide permit does not apply to any utility line or transmission facility that is subject to the jurisdiction of the Federal Energy Regulatory Commission.
3. For permanent access roads and electric or pumping substations, the PCN shall include a detailed justification of the need for their placement within a water of the United States, including wetlands, and a written discussion to support the applicant's assertion that additional avoidance and minimization measures are not practicable.
4. For aerial transmission lines across navigable waters:
 - a. The following minimum clearances are required for aerial transmission lines across navigable waters of the United States. These clearances are related to the clearances over the navigable channel provided by existing fixed bridges or clearances which would be required by the United States Coast Guard for new fixed bridges in the vicinity of the proposed aerial transmission line. These clearances are based on the low point of the line under conditions producing the greatest sag, taking into consideration temperature, load, wind, length of span, and type of supports as outlined in the National Electrical Safety Code:

Nominal System Voltage (kV) clearance required for bridges	Minimum additional clearance (ft.) above
115 and below	20
136	22
161	24
230	26
350	30
500	35
700	42
750 and above	45

b. Clearances for communication lines and other aerial crossings must be a minimum of 10 feet above clearances required for bridges, unless specifically authorized otherwise by the District Engineer.

c. Within 60 days of completion of the work, the permittee shall furnish the Corps and National Oceanic And Atmospheric Administration, National Ocean Service, N/CS261, Marine Chart Division, Nautical Data Branch, Station 7317, 1315 East-West Highway, Silver Spring, MD 20910-3282, with certification that the aerial wire has been installed in compliance with the approved plans. The certification shall include a survey, conducted by a licensed surveyor, which clearly shows the minimum clearance of the aerial wire above the mean high water line at the mean high water line at the time of the survey. The certification shall also include a statement by the permittee that the clearance of the wire(s), at maximum sag conditions, shall never be less than the clearance shown on the approved plans.

5. For Buried Cables and Pipelines Across Navigable Waters and Federal Navigation Channels:

- a. The top of the cable or pipeline crossing any Federal project channel shall be located a minimum of 15 feet below the authorized project channel depth. The District Engineer, on a case-by-case basis, may modify this depth requirement where circumstances are deemed appropriate. In areas outside of Federal project channels, the top of the cable or pipeline shall be located a minimum of 4 feet below the existing level of the waterway substrate. Where trenching and backfilling are proposed, backfill material shall consist of suitable heavy materials and shall be placed no higher or lower than the adjacent river bottom elevation.
- b. Within 60 days of completion of the work, the permittee shall furnish the Corps and the National Oceanic And Atmospheric Administration, National Ocean Service, N/CS261, Marine Chart Division, Nautical Data Branch, Station 7317, 1315 East-West Highway, Silver Spring, MD 20910-3282, with certification that the cable or pipeline has been installed in compliance with the approved plans. The certification shall include a survey, conducted by a licensed surveyor, which clearly shows the elevations and alignment of the cable or pipeline across the waterway. If the post-completion survey reveals a discrepancy between the authorized and actual alignment of the cable or pipeline, the permittee shall note clearly these discrepancies in the survey.
- c. Within 15 days after completion of the authorized work, the permittee shall post visible signage on weatherproof placards no smaller than 4 feet by 4 feet on each shoreline at the location of the authorized crossing. The placard shall contain language informing waterway users of the presence of a cable or pipeline crossing (e.g., "WARNING - CABLE [or PIPELINE] CROSSING"), unless specifically authorized otherwise by the District Engineer.

New York State Water Quality Certification for Nationwide Permit 12: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to construction of new utility lines in tidal wetlands.
2. This certification does not apply to discharges greater than 1/10th acre in size or to more than 200 linear feet of stream disturbance.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 12, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 12 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 12; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either : a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

13. Bank Stabilization. Bank stabilization activities necessary for erosion prevention provided the activity meets all of the following criteria:

- a. No material is placed in excess of the minimum needed for erosion protection;
- b. The bank stabilization activity is less than 500 feet in length;
- c. The activity will not exceed an average of one cubic yard per running foot placed along the bank below the plane of the ordinary high water mark or the high tide line;
- d. No material is placed in any special aquatic site, including wetlands;
- e. No material is of the type, or is placed in any location, or in any manner, so as to impair surface water

flow into or out of any wetland area;

- f. No material is placed in a manner that will be eroded by normal or expected high flows (properly anchored trees and treetops may be used in low energy areas); and,
- g. The activity is part of a single and complete project.

Bank stabilization activities in excess of 500 feet in length or greater than an average of one cubic yard per running foot may be authorized if the permittee notifies the District Engineer in accordance with the "Notification" general condition and the District Engineer determines the activity complies with the other terms and conditions of the NWP and the adverse environmental effects are minimal both individually and cumulatively. This NWP may not be used for the channelization of a water of the United States. (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 13: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to any bank stabilization activity more than two hundred (200) feet in length.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 13, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 13 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 13; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

14. Road Crossings. Activities required for the construction, expansion, modification, or improvement of linear transportation crossings (e.g., highways, railways, trails, and airport runways and taxiways) in waters of the United States, including wetlands, provided the activity meets the following criteria:

- a. This NWP is subject to the following acreage and linear limits:
 - (1) For public linear transportation projects in non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/2 acre of waters of the United States;
 - (2) For public linear transportation projects in tidal waters or non-tidal wetlands adjacent to tidal waters, provided the discharge does not cause the loss of greater than 1/3 acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet; or;
 - (3) For private linear transportation projects in all waters of the United States, provided the discharge does not cause the loss of greater than 1/3 acre of waters of the United States and the length of fill for the crossing in waters of the United States does not exceed 200 linear feet;
 - b. The permittee must notify the District Engineer in accordance with General Condition 13 if any of the following criteria are met:
 - (1) The discharge causes the loss of greater than 1/10 acre of waters of the United States; or
 - (2) There is a discharge in a special aquatic site, including wetlands;
 - c. The notification must include a compensatory mitigation proposal to offset permanent losses of waters of the United States to ensure that those losses result only in minimal adverse effects to the aquatic environment and a statement describing how temporary losses of waters of the United States will be minimized to the maximum extent practicable;
 - d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of the affected special aquatic sites;
 - e. The width of the fill is limited to the minimum necessary for the crossing;
 - f. This permit does not authorize stream channelization, and the authorized activities must not cause more than minimal changes to the hydraulic flow characteristics of the stream, increase flooding, or cause more than minimal degradation of water quality of any stream (see General Conditions 9 and 21);
 - g. This permit cannot be used to authorize non-linear features commonly associated with transportation projects, such as vehicle maintenance or storage buildings, parking lots, train stations, or aircraft hangars; and
 - h. The crossing is a single and complete project for crossing a water of the United States. Where a road segment (i.e., the shortest segment of a road with independent utility that is part of a larger project) has multiple crossings of streams (several single and complete projects) the Corps will consider whether it should use its discretionary authority to require an individual permit. (Sections 10 and 404)
- Note: Some discharges for the construction of farm roads, forest roads, or temporary roads for moving mining equipment may be eligible for an exemption from the need for a Section 404 permit (see 33 CFR 323.4).

Nationwide Permit 14 Specific Regional Conditions

1. Discharges of fill material associated with temporary road crossings in wetlands shall be placed on filter fabric. All temporary road crossings shall be removed upon completion of the work and the disturbed area restored to preconstruction contours, elevations and wetland conditions.
2. This Nationwide Permit does not apply to discharges in Cross Lake and adjacent wetlands or within adjacent sections of the Seneca River including adjacent wetlands within the limits of the Buffalo District's Cross Lake Flooding study.

New York State Water Quality Certification for Nationwide Permit 14: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to activities in tidal wetlands.
2. This certification does not apply to discharges greater than 1/10th acre in size or to more than 200 linear feet of stream disturbance, whether used singly or in conjunction with other linear transportation crossings.

New York Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 14, the following conditions shall apply in the following State and federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 14 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 14; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

15. U.S. Coast Guard Approved Bridges. Discharges of dredged or fill material incidental to the construction of bridges across navigable waters of the United States, including cofferdams, abutments, foundation seals, piers, and temporary construction and access fills provided such discharges have been authorized by the U.S. Coast Guard as part of the bridge permit. Causeways and approach fills are not included in this NWP and will require an individual or regional Section 404 permit. (Section 404)

New York State Water Quality Certification for Nationwide Permit 15: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation (NYSDEC) has denied Section 401 Water Quality Certification. Any party who proposes any such activity must first apply for and obtain a project-specific Section 401 Water Quality Certification from the NYSDEC prior to commencement of the activity.

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 15, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

16. Return Water From Upland Contained Disposal Areas. Return water from an upland, contained dredged material disposal area. The dredging itself may require a Section 404 permit (33 CFR 323.2(d)), but will require a Section 10 permit if located in navigable waters of the United States. The return water from a contained disposal area is administratively defined as a discharge of dredged material by 33 CFR 323.2(d) even though the disposal itself occurs on the upland and thus does not require a Section 404 permit. This NWP satisfies the technical requirement for a Section 404 permit for the return water where the quality of the return water is controlled by the state through the Section 401 certification procedures. (Section 404)

New York State Water Quality Certification for Nationwide Permit 16: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation (NYSDEC) has denied Section 401 Water Quality Certification. Any party who proposes any such activity must first apply for and obtain a project-specific Section 401 Water Quality Certification from the NYSDEC prior to commencement of the activity.

New York Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 16, the following conditions shall apply in the following State and federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 16 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 16; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

17. Hydropower Projects. Discharges of dredged or fill material associated with (a) small hydropower projects at existing reservoirs where the project, which includes the fill, are licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act of 1920, as amended; and has a total generating capacity of not more than 5000 KW; and the permittee notifies the District Engineer in accordance with the "Notification" general condition; or (b) hydropower projects for which the FERC has granted an exemption from licensing pursuant to Section 408 of the Energy Security Act of 1980 (16 U.S.C. 2705 and 2708) and Section 30 of the Federal Power Act, as amended; provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. (Section 404)

New York State Water Quality Certification for Nationwide Permit 17: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation (NYSDEC) has denied Section 401 Water Quality Certification. Any party who proposes any such activity must first apply for and obtain a project-specific Section 401 Water Quality Certification from NYSDEC prior to commencement of the activity.

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 17, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 17 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 17; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

18. Minor Discharges. Minor discharges of dredged or fill material into all waters of the United States provided that the activity meets all of the following criteria:

- a. The quantity of discharged material and the volume of excavated area does not exceed 25 cubic yards below the plane of the ordinary high water mark or the high tide line;
- b. The discharge, including any excavated area, will not cause the loss of more than 1/10 acre of a special aquatic site, including wetlands. For the purposes of this NWP, the acreage limitation includes the filled area and excavated area plus special aquatic sites that are adversely affected by flooding and special aquatic sites that are drained so that they would no longer be a water of the United States as a result of the project;
- c. If the discharge, including any excavated area, exceeds 10 cubic yards below the plane of the ordinary high water mark or the high tide line or if the discharge is in a special aquatic site, including wetlands, the permittee notifies the District Engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special

aquatic sites, including wetlands (Also see 33 CFR 330.1(e)); and

d. The discharge, including all attendant features, both temporary and permanent, is part of a single and complete project and is not placed for the purpose of a stream diversion.

e. This NWP can not be used in conjunction with NWP 26 for any single and complete project. (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 18: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This permit may not be used in combination with Nationwide Permits 13, 14, or 26 for any complete project.

New York Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 18, the following conditions shall apply in the following State and federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 18 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;

2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 18; and,

3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

19. Minor Dredging. Dredging of no more than 25 cubic yards below the plane of the ordinary high water mark or the mean high water mark from navigable waters of the United States (i.e., Section 10 waters) as part of a single and complete project. This NWP does not authorize the dredging or degradation through siltation of coral reefs, sites that support submerged aquatic vegetation (including sites where submerged aquatic vegetation is documented to exist, but may not be present in a given year), anadromous fish spawning areas, or wetlands, or the connection of canals or other artificial waterways to navigable waters of the United States (see Section 33 CFR 322.5(g)). (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 19: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 19, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 19 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;

2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 19; and,

3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

20. Oil Spill Cleanup. Activities required for the containment and cleanup of oil and hazardous substances which are subject to the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR Part 300) provided that the work is done in accordance with the Spill Control and Countermeasure Plan required by 40 CFR Part 112.3 and any existing State contingency plan and provided that the Regional Response Team (if one exists in the area) concurs with the proposed containment and cleanup action. (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 20: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 20, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

21. Surface Coal Mining Activities. Activities associated with surface coal mining activities provided they are authorized by the Department of the Interior, Office of Surface Mining (OSM), or by states with approved programs under Title V of the Surface Mining Control and Reclamation Act of 1977 and provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. The notification must include an OSM or state approved mitigation plan. The Corps, at the discretion of the District Engineer, may require a bond to ensure success of the mitigation, if no other Federal or state agency has required one. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. (Also see 33 CFR 330.1(e)) (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 21: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation (NYSDEC) has denied Section 401 Water Quality Certification. Any party who proposes any such activity must first apply for and obtain a project-specific Section 401 Water Quality Certification from the NYSDEC prior to commencement of the activity.

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 21, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

22. Removal of Vessels. Temporary structures or minor discharges of dredged or fill material required for the removal of wrecked, abandoned, or disabled vessels, or the removal of man-made obstructions to navigation. This NWP

does not authorize the removal of vessels listed or determined eligible for listing on the National Register of Historic Places unless the District Engineer is notified and indicates that there is compliance with the "Historic Properties" general condition. This NWP does not authorize maintenance dredging, shoal removal, or river bank snagging. Vessel disposal in waters of the United States may need a permit from EPA (see 40 CFR 229.3). (**Sections 10 and 404**)

New York State Water Quality Certification for Nationwide Permit 22: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to activities in the water surrounding Shooter's Island or in areas that are designated Significant Coastal Fish and Wildlife habitats.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 22, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 22 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 22; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

23. Approved Categorical Exclusions. Activities undertaken, assisted, authorized, regulated, funded, or financed, in whole or in part, by another Federal agency or department where that agency or department has determined, pursuant to the Council on Environmental Quality Regulation for Implementing the Procedural Provisions of the National Environmental Policy Act (40 CFR Part 1500 et seq.), that the activity, work, or discharge is categorically excluded from environmental documentation because it is included within a category of actions which neither individually nor cumulatively have a significant effect on the human environment, and the Office of the Chief of Engineers (ATTN: CECW-OR) has been furnished notice of the agency's or department's application for the categorical exclusion and concurs with that determination. Prior to approval for purposes of this NWP of any agency's categorical exclusions, the Chief of Engineers will solicit public comment. In addressing these comments, the Chief of Engineers may require certain conditions for authorization of an agency's categorical exclusions under this NWP. (**Sections 10 and 404**)

New York State Water Quality Certification for Nationwide Permit 23: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification is expressly limited to those categorical exclusions listed in one of the following documents:

- A) Regulatory Guidance Letter 87-10, Use of Nationwide Permit 23 for New Federal Highway Administrative (FHWA) Categorical Exclusions; or
- B) Regulatory Guidance Letter 96-1, Use of Nationwide Permit 23 for U.S. Coast Guard Categorical Exclusions.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 23, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 23 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 23; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

In addition, if the project satisfies the following, a consistency review by NYSDOS will not be required:

- 1) The activity is not listed under Section 23 CFR 771.117(c), subdivisions (3) and (18) and 771.117(d) subdivisions (1), (3), (4), (8) and (11) of the U.S. Department of Transportation regulations, and under Chapter 2.b, subdivisions 2.G(1), (2) and (3) of the United States Coast Guard Commandant Instruction M 16475.1B.

24. State Administered Section 404 Program. Any activity permitted by a state administering its own Section 404 permit program pursuant to 33 U.S.C. 1344(g)-(1) is permitted pursuant to Section 10 of the Rivers and Harbors Act of 1899. Those activities which do not involve a Section 404 state permit are not included in this NWP, but certain structures will be exempted by Section 154 of Public Law 94-587, 90 Stat. 2917 (33 U.S.C. 591) (see 33 CFR 322.3(a)(2)). (**Section 10**)

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 24, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

25. Structural Discharges. Discharges of material such as concrete, sand, rock, etc. into tightly sealed forms or cells where the material will be used as a structural member for standard pile supported structures, such as bridges, transmission line footings, and walkways or for general navigation, such as mooring cells, including the excavation of bottom material from within the form prior to the discharge of concrete, sand, rock, etc. This NWP does not authorize filled structural members that would support buildings, homes, parking areas, storage areas and other such structures. House pads or other building pads are also not included in this NWP. The structure itself may require a Section 10 permit if located in navigable waters of the United States. (**Section 404**)

New York State Water Quality Certification for Nationwide Permit 25: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to any structural discharge occurring in or adjacent to a designated Significant Fish and Wildlife habitat area.

2. This certification does not apply to any pile-supported structure with a surface area greater than 8,000 square feet.
3. The discharge shall not result in any structural member with a surface area greater than 64 square feet.
4. Spacing between piles or structural members shall be far enough apart that no accretion of bottom sediments will occur.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 25, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 25 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 25; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

26. Reserved

27. Stream and Wetland Restoration Activities. Activities in waters of the United States associated with the restoration of former waters, the enhancement of degraded tidal and non-tidal wetlands and riparian areas, the creation of tidal and non-tidal wetlands and riparian areas, and the restoration and enhancement of non-tidal streams and non-tidal open water areas as follows:

(a) The activity is conducted on:

(1) Non-Federal public lands and private lands, in accordance with the terms and conditions of a binding wetland enhancement, restoration, or creation agreement between the landowner and the U.S. Fish and Wildlife Service or the Natural Resources Conservation Service (NRCS) or voluntary wetland restoration, enhancement, and creation actions documented by the NRCS pursuant to NRCS regulations; or

(2) Any Federal land; or

(3) Reclaimed surface coal mined lands, in accordance with a Surface Mining Control and Reclamation Act permit issued by the Office of Surface Mining or the applicable state agency. (The future reversion does not apply to wetlands created, restored or enhanced as mitigation for the mining impacts, nor naturally due to hydrologic or topographic features, nor for a mitigation bank); or

(4) Any private or public land;

(b) Notification: For activities on any private or public land that are not described by paragraphs (a)(1), (a)(2), or (a)(3) above, the permittee must notify the District Engineer in accordance with the General Condition 13; and

(c) Only native plant species should be planted at the site, if the permittee is vegetating the project site. Activities authorized by this NWP include, but are not limited to: the removal of accumulated sediments; the installation, removal, and maintenance of small water control structures, dikes, and berms; the installation of current deflectors; the enhancement, restoration, or creation of riffle and pool stream structure; the placement of habitat structures; modifications of the stream bed and/or banks to restore or create stream meanders; the backfilling of artificial channels and drainage ditches; the removal of existing drainage structures; the construction of small nesting islands; the construction of open water areas; activities needed to reestablish vegetation, including plowing or discing for seed bed preparation; mechanized landclearing to remove undesirable vegetation; and other related activities.

This NWP does not authorize the conversion of a stream to another aquatic use, such as creation of an impoundment for waterfowl habitat. This NWP does not authorize stream channelization. This NWP does not authorize the conversion of natural wetlands to another aquatic use, such as creation of waterfowl impoundments where a forested wetland previously existed. However, this NWP authorizes the relocation of non-tidal waters, including non-tidal wetlands, on the project site provided there are net gains in the aquatic resource functions and values. For example, this NWP may authorize the creation of an open water impoundment in a non-tidal emergent wetland, provided the non-tidal emergent wetland is replaced by creating that wetland type on the project site. This NWP does not authorize the relocation of tidal waters or the conversion of tidal waters, including tidal wetlands, to other aquatic uses, such as the conversion of tidal wetlands into open water impoundments.

Reversion. For enhancement, restoration and creation projects conducted under paragraphs (a)(2) and (a)(4), this NWP does not authorize any future discharge of dredged or fill material associated with the reversion of the area to its prior condition. In such cases a separate permit at that time would be required for any reversion. For restoration, enhancement and creation projects conducted under paragraphs (a)(1) and (a)(3), this NWP also authorizes any future discharge of dredged or fill material associated with the reversion of the area to its documented prior condition and use (i.e., prior to the restoration, enhancement, or creation activities) within five years after expiration of a limited term wetland restoration or creation agreement or permit, even if the discharge occurs after this NWP expires. This NWP also authorizes the reversion of wetlands that were restored, enhanced, or created on prior-converted cropland that has not been abandoned, in accordance with a binding agreement between the landowner and NRCS or FWS (even though the restoration, enhancement, or creation activity did not require a Section 404 permit). The five-year reversion limit does not apply to agreements without time limits reached under paragraph (a)(1). The prior condition will be documented in the original agreement or permit, and the determination of return to prior conditions will be made by the Federal agency or appropriate state agency executing the agreement or permit. Prior to any reversion activity the permittee or the appropriate Federal or state agency must notify the District Engineer and include the documentation of the prior condition. Once an area has reverted back to its prior physical condition, it will be subject to whatever the Corps regulatory requirements will be at that future date. **(Sections 10 and 404)**

Note: Compensatory mitigation is not required for activities authorized by this NWP, provided the authorized work results in a net increase in aquatic resource functions and values in the project area. This NWP can be used to authorize compensatory mitigation projects, including mitigation banks, provided the permittee notifies the District Engineer in accordance with the General Condition 13, and the project includes compensatory mitigation for impacts to waters of the United States caused by the authorized work. However, this NWP does not authorize the reversion of an area used for a compensatory mitigation project to its prior condition. NWP 27 can be used to authorize impacts at a mitigation bank, but only in circumstances where it has been approved under the Interagency Federal Mitigation Banks Guidelines.

New York State Water Quality Certification for Nationwide Permit 27: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 27, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 27 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide

Permit 27; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

28. Modifications of Existing Marinas. Reconfiguration of existing docking facilities within an authorized marina area. No dredging, additional slips or dock spaces, or expansion of any kind within waters of the United States is authorized by this NWP. (Section 10)

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 28, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 28 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 28; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

In addition, if the project satisfies the following, a consistency review by NYSDOS will not be required:

1. The authorized modifications shall not result in a change of use of the existing docking facilities (e.g. the conversion of docks to decks).

29. Single-Family Housing. Discharges of dredged or fill material into non-tidal waters of the United States, including non-tidal wetlands, for the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee provided that the activity meets all of the following criteria:

- a. The discharge does not cause the loss of more than 1/4 acre of non-tidal waters of the United States, including non-tidal wetlands;
- b. The permittee notifies the District Engineer in accordance with the "Notification" general condition;
- c. The permittee has taken all practicable actions to minimize the on-site and off-site impacts of the discharge. For example, the location of the home may need to be adjusted on-site to avoid flooding of adjacent property owners;
- d. The discharge is part of a single and complete project; furthermore, that for any subdivision created on or after November 22, 1991, the discharges authorized under this NWP may not exceed an aggregate total loss of waters of the United States of 1/4 acre for the entire subdivision;
- e. An individual may use this NWP only for a single-family home for a personal residence;
- f. This NWP may be used only once per parcel;
- g. This NWP may not be used in conjunction with NWP 14, NWP 18, or NWP 26, for any parcel; and,
- h. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation.

For the purposes of this NWP, the acreage of loss of waters of the United States includes the filled area previously permitted, the proposed filled area, and any other waters of the United States that are adversely affected by flooding, excavation, or drainage as a result of the project. Whenever any other NWP is used in conjunction with this NWP, the total acreage of impacts to waters of the United States of all NWPs combined, can not exceed 1/4 acre. This NWP authorizes activities only by individuals; for this purpose, the term "individual" refers to a natural person and/or a married couple, but does not include a corporation, partnership, or similar entity. For the purposes of this NWP, a parcel of land is defined as "the entire contiguous quantity of land in possession of, recorded as property of, or owned (in any form of ownership, including land owned as a partner, corporation, joint tenant, etc.) by the same individual (and/or that individual's spouse), and comprises not only the area of wetlands sought to be filled, but also all land contiguous to those wetlands, owned by the individual (and/or that individual's spouse) in any form of ownership." (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 29: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation (NYSDEC) has denied Section 401 Water Quality Certification. Any party who proposes any such activity must first apply for and obtain a project-specific Section 401 Water Quality Certification from the NYSDEC prior to commencement of the activity.

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permit 29, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 29 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 29; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

30. Moist Soil Management for Wildlife. Discharges of dredged or fill material and maintenance activities that are associated with moist soil management for wildlife performed on non-tidal Federally-owned or managed and State-owned or managed property, for the purpose of continuing ongoing, site-specific, wildlife management activities where soil manipulation is used to manage habitat and feeding areas for wildlife. Such activities include, but are not limited to: the repair, maintenance or replacement of existing water control structures; the repair or maintenance of dikes; and plowing or discing to impede succession, prepare seed beds, or establish fire breaks. Sufficient vegetated buffers must be maintained adjacent to all open water bodies, streams, etc., to preclude water quality degradation due to erosion and sedimentation. This NWP does not authorize the construction of new dikes, roads, water control structures, etc. associated with the management areas. This NWP does not authorize converting wetlands to uplands, impoundments or other open water bodies. (Section 404)

New York State Water Quality Certification for Nationwide Permit 30: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable

New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 30, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

31. Maintenance of Existing Flood Control Facilities. Discharges of dredged or fill material for the maintenance of existing flood control facilities, including debris basins, retention/detention basins, and channels that were (i) previously authorized by the Corps by individual permit, general permit, or by 33 CFR 330.3 and constructed or (ii) constructed by the Corps and transferred to a local sponsor for operation and maintenance. The maintenance is limited to that approved in a maintenance baseline determination made by the district engineer (DE). The prospective permittee will provide the DE with sufficient evidence for the DE to determine the approved and constructed baseline. Subsequent to the determination of the maintenance baseline and prior to any maintenance work, the permittee must notify the DE in accordance with the "Notification" general condition.

All dredged material must be placed in an upland site or a currently authorized disposal site in waters of the United States, and proper siltation controls must be used. This NWP does not authorize the removal of sediment and associated vegetation from natural water courses. (Activities that involve only the cutting and removing of vegetation above the ground, e.g., mowing, rotary cutting, and chain sawing, where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material, does not require a Section 404 permit in accordance with 33 CFR 323.2(d)(2)(ii)). Only constructed channels within stretches of natural rivers that have been previously authorized as part of a flood control facility could be authorized for maintenance under this NWP.

Maintenance Baseline. Upon receipt of sufficient evidence, the DE will determine the maintenance baseline. The maintenance baseline is the existing flood control project that the DE has determined can be maintained under this NWP, subject to any case-specific conditions required by the DE. In determining the maintenance baseline, the DE will consider the following factors: the approved facility, the actual constructed facility, the Corps constructed project that was transferred, the maintenance history, if the facility has been functioning at a reduced capacity and for how long, present vs. original flood control needs, and if sensitive/unique functions and values may be adversely affected. Revocation or modification of the final determination of the maintenance baseline can only be done in accordance with 33 CFR Part 330.5.

This NWP can not be used until the DE determines the maintenance baseline and the need for mitigation and any regional or activity-specific conditions. The maintenance baseline will only be determined once and will remain valid for any subsequent reissuance of this NWP. However, if the project is effectively abandoned or reduced due to lack of proper maintenance, a new determination of a maintenance baseline would be required before this NWP could be used for subsequent maintenance.

Mitigation. In determining the need for mitigation, the DE will consider the following factors: any original mitigation required, the current environmental setting, and any adverse effects of the maintenance project that were not mitigated in the original construction. The DE will not delay needed maintenance for completion of any required mitigation, provided that the DE and the applicant establish a schedule for the identification, approval, development, construction and completion of such required mitigation. (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 31: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 31, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

32. Completed Enforcement Actions. Any structure, work or discharge of dredged or fill material, remaining in place, or undertaken for mitigation, restoration, or environmental benefit in compliance with either:

- (i) the terms of a final written Corps non-judicial settlement agreement resolving a violation of Section 404 of the Clean Water Act (CWA) and/or Section 10 of the Rivers and Harbors Act of 1899; or the terms of an EPA 309(a) order on consent resolving a violation of Section 404 of the CWA, provided that:
 - a. The unauthorized activity affected no more than 5 acres of nontidal wetlands or 1 acre of tidal wetlands;
 - b. The settlement agreement provides for environmental benefits, to an equal or greater degree, than the environmental detriments caused by the unauthorized activity that is authorized by this nationwide permit; and
 - c. The District Engineer issues a verification letter authorizing the activity subject to the terms and conditions of this nationwide permit and the settlement agreement, including a specified completion date; or
- (ii) the terms of a final Federal court decision, consent decree, or settlement agreement resulting from an enforcement action brought by the United States under Section 404 of the CWA and/or Section 10 of the Rivers and Harbors Act of 1899.

For both (i) or (ii) above, compliance is a condition of the NWP itself. Any authorization under this NWP is automatically revoked if the permittee does not comply with the terms of this NWP or the terms of the court decision, consent decree, or judicial/non-judicial settlement agreement or fails to complete the work by the specified completion date. This NWP does not apply to any activities occurring after the date of the decision, decree, or agreement that are not for the purpose of mitigation, restoration, or environmental benefit. Prior to reaching any settlement agreement the Corps will ensure compliance with the provisions of 33 CFR Part 326 and 33 CFR 330.6(d)(2) and (e). (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 32: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification applies only to enforcement actions for which there is complete environmental remediation of the illegal activity, and not to activities for which only a penalty has been assessed.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 32, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 32 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 32; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

33. Temporary Construction, Access and Dewatering. Temporary structures, work and discharges, including cofferdams, necessary for construction activities or access fills or dewatering of construction sites; provided that the associated primary activity is authorized by the Corps of Engineers or the U.S. Coast Guard, or for other construction activities not subject to the Corps or U.S. Coast Guard regulations. Appropriate measures must be taken to maintain near normal downstream flows and to minimize flooding. Fill must be of materials, and placed in a manner, that will not be eroded by expected high flows. The use of dredged material may be allowed if it is determined by the District Engineer that it will not cause more than minimal adverse effects on aquatic resources. Temporary fill must be entirely removed to upland areas, or dredged material returned to its original location, following completion of the construction activity, and the affected areas must be restored to the pre-project conditions. Cofferdams cannot be used to dewater wetlands or other aquatic areas so as to change their use. Structures left in place after cofferdams are removed require a Section 10 permit if located in navigable waters of the United States. (See 33 CFR Part 322). The permittee must notify the District Engineer in accordance with the "Notification" general condition. The notification must also include a restoration plan of

reasonable measures to avoid and minimize adverse effects to aquatic resources. The District Engineer will add special conditions, where necessary, to ensure that adverse environmental effects are minimal. Such conditions may include: limiting the temporary work to the minimum necessary; requiring seasonal restrictions; modifying the restoration plan; and requiring alternative construction methods (e.g., construction mats in wetlands where practicable). (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 33: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to hydropower projects.
2. Dewatering shall be limited to areas that are cofferdammed or otherwise isolated from the larger waterbody or waters of the United States. Dewatering may not drain a waterbody totally or reduce the water level such that fish and other aquatic vertebrates are killed or their eggs and nests are exposed to desiccation, freezing, or depredation.
3. Cofferdams or diversions shall not be constructed in a manner that causes erosion in the remaining area of a flowing water system, such as a stream channel.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 33, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 33 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 33; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

- 34. Cranberry Production Activities.** Discharges of dredged or fill material for dikes, berms, pumps, water control structures or leveling of cranberry beds associated with expansion, enhancement, or modification activities at existing cranberry production operations provided that the activity meets all of the following criteria:
- a. The cumulative total acreage of disturbance per cranberry production operation, including but not limited to, filling, flooding, ditching, or clearing, does not exceed 10 acres of waters of the United States, including wetlands;
 - b. The permittee notifies the District Engineer in accordance with the "Notification" general condition. The notification must include a delineation of affected special aquatic sites, including wetlands; and,
 - c. The activity does not result in a net loss of wetland acreage.

This NWP does not authorize any discharge of dredged or fill material related to other cranberry production activities such as warehouses, processing facilities, or parking areas. For the purposes of this NWP, the cumulative total of 10 acres will be measured over the period that this NWP is valid. (Section 404)

New York State Water Quality Certification for Nationwide Permit 34: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation (NYSDEC) has denied Section 401 Water Quality Certification. Any party who proposes any such activity must first apply for and obtain a project-specific Section 401 Water Quality Certification from the NYSDEC prior to commencement of the activity.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 34, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

- 35. Maintenance Dredging of Existing Basins.** Excavation and removal of accumulated sediment for maintenance of existing marina basins, access channels to marina basins or boat slips, and boat slips to previously authorized depths or controlling depths for ingress/egress, whichever is less, provided the dredged material is disposed of at an upland site and proper siltation controls are used. (Section 10)

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 35, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 35 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 35; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

- 36. Boat Ramps.** Activities required for the construction of boat ramps provided:
- a. The discharge into waters of the United States does not exceed 50 cubic yards of concrete, rock, crushed stone or gravel into forms, or placement of pre-cast concrete planks or slabs. (Unsuitable material that causes unacceptable chemical pollution or is structurally unstable is not authorized);
 - b. The boat ramp does not exceed 20 feet in width;
 - c. The base material is crushed stone, gravel or other suitable material;
 - d. The excavation is limited to the area necessary for site preparation and all excavated material is removed to the upland; and,
 - e. No material is placed in special aquatic sites, including wetlands.
- Dredging to provide access to the boat ramp may be authorized by another NWP, regional general permit, or individual permit pursuant to Section 10 if located in navigable waters of the United States. (Sections 10 and 404)

New York State Water Quality Certification for Nationwide Permit 36: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 36, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 36 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAP), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 36; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

37. Emergency Watershed Protection and Rehabilitation. Work done by or funded by the Natural Resources Conservation Service qualifying as an "emergency" situation (requiring immediate action) under its Emergency Watershed Protection Program (7 CFR Part 624) and work done or funded by the Forest Service under its Burned-Area Emergency Rehabilitation Handbook (FSH 509.13) provided the District Engineer is notified in accordance with the "Notification" general condition. (Also see 33 CFR 330.1(e)). **(Sections 10 and 404)**

New York State Water Quality Certification for Nationwide Permit 37: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 37, NYSDOS issued concurrence with the U.S. Army Corps of Engineers consistency determination.

38. Cleanup of Hazardous and Toxic Waste. Specific activities required to effect the containment, stabilization, or removal of hazardous or toxic waste materials that are performed, ordered, or sponsored by a government agency with established legal or regulatory authority provided the permittee notifies the District Engineer in accordance with the "Notification" general condition. For discharges in special aquatic sites, including wetlands, the notification must also include a delineation of affected special aquatic sites, including wetlands. Court ordered remedial action plans or related settlements are also authorized by this NWP. This NWP does not authorize the establishment of new disposal sites or the expansion of existing sites used for the disposal of hazardous or toxic waste. Activities undertaken entirely on a CERCLA site by authority of CERCLA as approved or required by EPA, are not required to obtain permits under Section 404 of the Clean Water Act or Section 10 of the Rivers and Harbors Act. **(Sections 10 and 404)**

New York State Water Quality Certification for Nationwide Permit 38: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 38, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 38 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAP), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 38; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

39. Residential, Commercial, and Institutional Developments. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of residential, commercial, and institutional building foundations and building pads and attendant features that are necessary for the use and maintenance of the structures. Attendant features may include, but are not limited to, roads, parking lots, garages, yards, utility lines, stormwater management facilities, and recreation facilities such as playgrounds, playing fields, and golf courses (provided the golf course is an integral part of the residential development). The construction of new ski areas or oil and gas wells is not authorized by this NWP. Residential developments include multiple and single unit developments. Examples of commercial developments include retail stores, industrial facilities, restaurants, business parks, and shopping centers. Examples of institutional developments include schools, fire stations, government office buildings, judicial buildings, public works buildings, libraries, hospitals, and places of worship. The activities listed above are authorized, provided the activities meet all of the following criteria:

- a. The discharge does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;
- b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;
- c. The permittee must notify the District Engineer in accordance with General Condition 13, if any of the following criteria are met:
 - (1) The discharge causes the loss of greater than 1/10 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters; or
 - (2) The discharge causes the loss of any open waters, including perennial or intermittent streams, below the ordinary high water mark (see Note, below).
- d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;
- e. The discharge is part of a single and complete project;
- f. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification, when required, must include a written statement explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site. Compensatory mitigation will normally be required to offset the losses of waters of the United States. (See General Condition 19.) The notification must also include a compensatory mitigation proposal for offsetting unavoidable losses of waters of the United States. If an applicant asserts that the adverse effects of the project are minimal without mitigation, then the applicant may submit justification explaining why compensatory mitigation should not be required for the District Engineer's consideration;
- g. When this NWP is used in conjunction with any other NWP, any combined total permanent loss of waters of the United States exceeding 1/10 acre requires that the permittee notify the District Engineer in accordance with General Condition 13;
- h. Any work authorized by this NWP must not cause more than minimal degradation of water quality or more than minimal changes to the flow characteristics of any stream (see General Conditions 9 and 21);
- i. For discharges causing the loss of 1/10 acre or less of waters of the United States, the permittee must submit a report, within 30 days of completion of the work, to the District Engineer that contains the following

information: (1) The name, address, and telephone number of the permittee; (2) The location of the work; (3) A description of the work; (4) The type and acreage of the loss of waters of the United States (e.g., 1/12 acre of emergent wetlands); and (5) The type and acreage of any compensatory mitigation used to offset the loss of waters of the United States (e.g., 1/12 acre of emergent wetlands created on-site);

j. If there are any open waters or streams within the project area, the permittee will establish and maintain, to the maximum extent practicable, wetland or upland vegetated buffers next to those open waters or streams consistent with General Condition 19. Deed restrictions, conservation easements, protective covenants, or other means of land conservation and preservation are required to protect and maintain the vegetated buffers established on the project site; and

k. Stream channelization or stream relocation downstream of the point on the stream where the annual average flow is 1 cubic foot per second is not authorized by this NWP.

Only residential, commercial, and institutional activities with structures on the foundation(s) or building pad(s), as well as the attendant features, are authorized by this NWP. The compensatory mitigation proposal required in paragraph (f) of this NWP may be either conceptual or detailed. The wetland or upland vegetated buffer required in paragraph (j) of this NWP will normally be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. The required wetland or upland vegetated buffer is part of the overall compensatory mitigation requirement for this NWP. If the project site was previously used for agricultural purposes and the farm owner/ operator used NWP 40 to authorize activities in waters of the United States to increase production or construct farm buildings, NWP 39 cannot be used by the developer to authorize additional activities in waters of the United States on the project site in excess of the acreage limit for NWP 39 (i.e., the combined acreage loss authorized under NWPs 39 and 40 cannot exceed 1/2 acre).

Subdivisions: For any real estate subdivision created or subdivided after October 5, 1984, a notification pursuant to paragraph (c) of this NWP is required for any discharge which would cause the aggregate total loss of waters of the United States for the entire subdivision to exceed 1/10 acre. Any discharge in any real estate subdivision which would cause the aggregate total loss of waters of the United States in the subdivision to exceed 1/2 acre is not authorized by this NWP, unless the District Engineer exempts a particular subdivision or parcel by making a written determination that the individual and cumulative adverse environmental effects would be minimal and the property owner had, after October 5, 1984, but prior to July 21, 1999, committed substantial resources in reliance on NWP 26 with regard to a subdivision, in circumstances where it would be inequitable to frustrate the property owner's investment-backed expectations. Once the exemption is established for a subdivision, subsequent lot development by individual property owners may proceed using NWP 39. For the purposes of NWP 39, the term "real estate subdivision" shall be interpreted to include circumstances where a landowner or developer divides a tract of land into smaller parcels for the purpose of selling, conveying, transferring, leasing, or developing said parcels. This would include the entire area of a residential, commercial, or other real estate subdivision, including all parcels and parts thereof. (Sections 10 and 404)

Note: Areas where there is no wetland vegetation are determined by the presence or absence of an ordinary high water mark or bed and bank. Areas that are waters of the United States based on this criteria would require a PCN even though water is infrequently present in the stream channel (except for ephemeral waters).

Nationwide Permit 39 Specific Regional Conditions

1. This nationwide permit does not apply to regulated activities that involve the discharge of dredged or fill material into open waters below the ordinary high water mark for all navigable waters, the Finger Lakes, Chautauqua Lake, and all other lakes and ponds exceeding 75 acres in open water area.
2. A PCN is required for **any** discharge into those Waters of the United States identified in Section F.1., below.
3. The regulated activity cannot cause the loss of areas classified as bogs or fens, as determined by the Buffalo District Corps of Engineers.
4. All fills for recreation activities associated with the development proposed as part of this authorization must not substantially deviate from natural landscape contours and be designed to minimize adverse effects to waters of the United States, including wetlands and riparian areas. This shall be accomplished through the use of practices such as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc.
5. This nationwide permit does not apply to discharges in Cross Lake and adjacent wetlands or within adjacent sections of the Seneca River including adjacent wetlands within the limits of the Buffalo District's Cross Lake Flooding study.

New York State Water Quality Certification for Nationwide Permit 39: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to golf courses or to stormwater facilities in waters of the state, including wetlands.
2. This certification does not apply to discharges greater than 1/10th acre in size or to more than 200 linear feet of stream disturbance.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permits 39, the following conditions shall apply anywhere in the State's coastal area:

Activities may not be authorized under Nationwide Permit 39 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (PCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 39; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

40. Farm Buildings. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the purpose of improving agricultural production and the construction of building pads for farm buildings. Authorized activities include the installation, placement, or construction of drainage tiles, ditches, or levees; mechanized landclearing; land leveling; the relocation of existing serviceable drainage ditches constructed in waters of the United States; and similar activities, provided the permittee complies with the following terms and conditions:

a. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is a USDA program participant:

(1) The permittee must obtain a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS in accordance with the provisions of the Food Security Act of 1985, as amended (16 U.S.C. 3801 et seq.);

(2) The discharge into non-tidal wetlands does not result in the loss of greater than 1/2 acre of non-tidal wetlands on a farm tract;

(3) The permittee must have an NRCS-certified wetland delineation;

(4) The permittee must implement an NRCS-approved compensatory mitigation plan that fully offsets wetland losses, if required; and

(5) The permittee must submit a report, within 30 days of completion of the authorized work, to the District Engineer that contains the following information:

(a) The name, address, and telephone number of the permittee;

(b) The location of the work;

(c) A description of the work;

(d) The type and acreage (or square feet) of the loss of wetlands (e.g., 1/3 acre of emergent

- wetlands); and
- (e) The type, acreage (or square feet), and location of compensatory mitigation (e.g., 1/3 acre of emergent wetlands on the farm tract); or
- b. For discharges into non-tidal wetlands to improve agricultural production, the following criteria must be met if the permittee is not a USDA program participant (or a USDA program participant for which the proposed work does not qualify for authorization under paragraph (a) of this NWP):
- (1) The discharge into non-tidal wetlands does not result in the loss of greater than 1/2 acre of non-tidal wetlands on a farm tract;
 - (2) The permittee must notify the District Engineer in accordance with General Condition 13, if the discharge results in the loss of greater than 1/10 acre of non-tidal wetlands;
 - (3) The notification must include a delineation of affected wetlands; and
 - (4) The notification must include a compensatory mitigation proposal to offset losses of waters of the United States; or
- c. For the construction of building pads for farm buildings, the discharge does not cause the loss of greater than 1/2 acre of non-tidal wetlands that were in agricultural production prior to December 23, 1985, (i.e., farmed wetlands) and the permittee must notify the District Engineer in accordance with General Condition 13; or
- d. Any activity in other waters of the United States is limited to the relocation of existing serviceable drainage ditches constructed in non-tidal streams. This NWP does not authorize the relocation of greater than 300 linear feet of existing serviceable drainage ditches constructed in non-tidal streams; and
- e. Activities located in 100-year floodplains identified by FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps must comply with General Condition 26.

The term "farm tract" refers to a parcel of land identified by the Farm Service Agency. The Corps will identify other waters of the United States on the farm tract. NRCS will determine if a proposed agricultural activity meets the terms and conditions of paragraph (a) of this NWP, except as provided below. For those activities that require notification, the District Engineer will determine if a proposed agricultural activity is authorized by paragraphs (b), (c), and/or (d) of this NWP. USDA program participants requesting authorization for discharges of dredged or fill material into waters of the United States authorized by paragraphs (c) or (d) of this NWP, in addition to paragraph (a), must notify the District Engineer in accordance with General Condition 13 and the District Engineer will determine if the entire single and complete project is authorized by this NWP. Discharges of dredged or fill material into waters of the United States associated with completing required compensatory mitigation are authorized by this NWP. However, total impacts, including other authorized impacts under this NWP, may not exceed the 1/2 acre limit of this NWP. This NWP does not affect, or otherwise regulate, discharges associated with agricultural activities when the discharge qualifies for an exemption under Section 404(f) of the Clean Water Act, even though a categorical minimal effects exemption, minimal effect exemption, or mitigation exemption from NRCS pursuant to the Food Security Act of 1985, as amended, may be required. Activities authorized by paragraphs (a) through (d) may not exceed a total of 1/2 acre on a single farm tract. Activities authorized by paragraphs (c) and (d) are not included in the 1/2 acre limit for the farm tract. If the site was used for agricultural purposes and the farm owner/operator used either paragraphs (a), (b), or (c) of this NWP to authorize activities in waters of the United States to increase agricultural production or construct farm buildings, and the current landowner wants to use NWP 39 to authorize residential, commercial, or industrial development activities in waters of the United States on the site, the combined acreage loss authorized by NWPs 39 and 40 cannot exceed 1/2 acre. **(Section 404)**

Nationwide Permit 40 Specific Regional Conditions

1. Non-USDA program participants or USDA program participants for which the proposed work does not qualify for authorization under paragraph (a) of this NWP, must demonstrate that the building is necessary for the agricultural production of the land.

New York State Water Quality Certification for Nationwide Permit 40: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities undertaken in accordance with the special conditions listed below will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

1. This certification does not apply to discharges greater than 1/10th acre in size or to more than 200 linear feet of stream disturbance.
2. This certification does not apply to any buildings for which the applicant is not able to demonstrate that they are necessary for the agricultural productivity of the land.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 40, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 40 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 40; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

41. Reshaping Existing Drainage Ditches. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, to modify the cross-sectional configuration of currently serviceable drainage ditches constructed in these waters. The reshaping of the ditch cannot increase drainage capacity beyond the original design capacity or expand the area drained by the ditch as originally designed (i.e., the capacity of the ditch must be the same as originally designed and it cannot drain additional wetlands or other waters of the United States). Compensatory mitigation is not required because the work is designed to improve water quality (e.g., by regrading the drainage ditch with gentler slopes, which can reduce erosion, increase growth of vegetation, increase uptake of nutrients and other substances by vegetation, etc.). The permittee must notify the District Engineer in accordance with General Condition 13, if greater than 500 linear feet of drainage ditch will be reshaped. Material resulting from excavation may not be permanently sidecast into waters but may be temporarily sidecast (up to three months) into waters of the United States, provided the material is not placed in such a manner that it is dispersed by currents or other forces. The District Engineer may extend the period of temporary sidecasting not to exceed a total of 180 days, where appropriate. This NWP does not apply to reshaping drainage ditches constructed in uplands, since these areas are not waters of the United States, and thus no permit from the Corps is required, or to the maintenance of existing drainage ditches to their original dimensions and configuration, which does not require a Section 404 permit (see 33 CFR 323.4(a)(3)). This NWP does not authorize the relocation of drainage ditches constructed in waters of the United States; the location of the centerline of the reshaped drainage ditch must be approximately the same as the location of the centerline of the original drainage ditch. This NWP does not authorize stream channelization or stream relocation projects. **(Section 404)**

Nationwide Permit 41 Specific Regional Condition

1. Materials resulting from reshaping activities which are temporarily sidecast into waters of the U.S. must be removed within 30 days of the date of deposition.
2. The permittee must provide documentation on serviceability of the ditch system and a history of maintenance activity with the PCN.

3. The regulated activity cannot cause the loss of areas classified as bogs or fens, as determined by the Buffalo District Corps of Engineers.

New York State Water Quality Certification for Nationwide Permit 41: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permit 41, the following conditions shall apply:

Activities may not be authorized under Nationwide Permit 41 in State Designated Significant Coastal Fish and Wildlife Habitats or ditches within the coastal area that drain into the following special management areas:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by State and Federally approved Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by State and Federally approved Harbor Management Plans;
- e) areas within a State designated Scenic Area of Statewide Significance; and,
- f) State designated Coastal Erosion Hazard Areas

until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAP), and all necessary supporting information and data;

2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 41; and,

3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

42. Recreational Facilities. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction or expansion of recreational facilities, provided the activity meets all of the following criteria:

- a. The discharge does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;
- b. The discharge does not cause the loss of greater than 300 linear feet of stream bed;
- c. For discharges causing the loss of greater than 1/10 acre of non-tidal waters of the United States, the permittee notifies the District Engineer in accordance with General Condition 13;
- d. For discharges in special aquatic sites, including wetlands, the notification must include a delineation of affected special aquatic sites;
- e. The discharge is part of a single and complete project; and
- f. Compensatory mitigation will normally be required to offset the losses of waters of the United States.

The notification must also include a compensatory mitigation proposal which provides for 1:1 replacement to offset authorized losses of waters of the United States.

For the purposes of this NWP, the term "recreational facility" is defined as a recreational activity that is integrated into the natural landscape and does not substantially change preconstruction grades or deviate from natural landscape contours. For the purpose of this permit, the primary function of recreational facilities does not include the use of motor vehicles, buildings, or impervious surfaces. Examples of recreational facilities that may be authorized by this NWP include: hiking trails, bike paths, horse paths, nature centers, and campgrounds (excluding trailer parks). The construction or expansion of golf courses and the expansion of ski areas may be authorized by this NWP, provided the golf course or ski area does not substantially deviate from natural landscape contours and is designed to minimize adverse effects to waters of the United States and riparian areas through the use of such practices as integrated pest management, adequate stormwater management facilities, vegetated buffers, reduced fertilizer use, etc. The facility must have an adequate water quality management plan in accordance with General Condition 9, such as a stormwater management facility, to ensure that the recreational facility results in no substantial adverse effects to water quality. This NWP also authorizes the construction or expansion of small support facilities, such as maintenance and storage buildings and stables, that are directly related to the recreational activity. This NWP does not authorize other buildings, such as hotels, restaurants, etc. The construction or expansion of playing fields (e.g., baseball, soccer, or football fields), basketball and tennis courts, racetracks, stadiums, arenas, and the construction of new ski areas are not authorized by this NWP. **(Section 404)**

Nationwide Permit 42 Specific Regional Conditions

1. This authorization is not available for construction or expansion of any golf course or ski resort.

2. Parking facilities authorized under this nationwide permit must consist solely of pervious surfaces.

3. This nationwide permit does not apply to regulated activities that involve the discharge of dredged or fill material into open waters below the ordinary high water mark for all navigable waters, the Finger Lakes, Chautauqua Lake, and all other lakes and ponds exceeding 75 acres in open water area.

4. The permittee must avoid and minimize impacts to wetlands at the project site to the maximum extent practicable. The PCN must include a written statement supporting the assertion that additional avoidance and minimization measures are not practicable.

5. A PCN is required for any discharge into those waters of the United States identified in Section F.1., below.

6. For all discharges exceeding 1/10 acre the mitigation replacement ratio to offset losses of water of the United States, including wetlands, will be a **minimum** of 1:1.

7. The regulated activity cannot cause the loss of areas classified as bogs or fens, as determined by the Buffalo District Corps of Engineers.

New York State Water Quality Certification for Nationwide Permit 42: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYS DOS), Coastal Zone Management. For Nationwide Permits 42, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 42 until:

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAP), and all necessary supporting information and data;

2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 42; and,

3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed,

and NYSDOS concurs with the applicant's consistency certification after completing that review.

43. Stormwater Management Facilities. Discharges of dredged or fill material into non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters, for the construction and maintenance of stormwater management facilities, including activities for the excavation of stormwater ponds/facilities, detention basins, and retention basins; the installation and maintenance of water control structures, outfall structures and emergency spillways; and the maintenance dredging of existing stormwater management ponds/facilities and detention and retention basins, provided the activity meets all of the following criteria:

- a. The discharge for the construction of new stormwater management facilities does not cause the loss of greater than 1/2 acre of non-tidal waters of the United States, excluding non-tidal wetlands adjacent to tidal waters;
- b. The discharge does not cause the loss of greater than 300 linear feet of streambed;
- c. The discharge of dredged or fill material for the construction of new stormwater management facilities in perennial streams is not authorized;
- d. For discharges or excavation for the construction of new stormwater management facilities or for the maintenance of existing stormwater management facilities causing the loss of greater than 1/10 acre of non-tidal waters, excluding non-tidal wetlands adjacent to tidal waters, the permittee notifies the District Engineer in accordance with General Condition 13. In addition, the notification must include:
 - (1) A maintenance plan. The maintenance plan should be in accordance with State and local requirements, if any such requirements exist;
 - (2) For discharges in special aquatic sites, including wetlands and submerged aquatic vegetation, the notification must include a delineation of affected areas; and
 - (3) A compensatory mitigation proposal that offsets the loss of waters of the United States. Maintenance in constructed areas will not require mitigation provided such maintenance is accomplished in designated maintenance areas and not within compensatory mitigation areas (i.e., district engineers may designate non-maintenance areas, normally at the downstream end of the stormwater management facility, in existing stormwater management facilities). (No mitigation will be required for activities which are exempt from Section 404 permit requirements);
- e. The permittee must avoid and minimize discharges into waters of the United States at the project site to the maximum extent practicable, and the notification must include a written statement to the District Engineer detailing compliance with this condition (i.e., why the discharge must occur in waters of the United States and why additional minimization cannot be achieved);
- f. The stormwater management facility must comply with General Condition 21 and be designed using best management practices (BMPs) and watershed protection techniques. Examples may include forebays (deeper areas at the upstream end of the stormwater management facility that would be maintained through excavation), vegetated buffers, and siting considerations to minimize adverse effects to aquatic resources. Another example of a BMP would be bioengineering methods incorporated into the facility design to benefit water quality and minimize adverse effects to aquatic resources from storm flows, especially downstream of the facility, that provide, to the maximum extent practicable, for long term aquatic resource protection and enhancement;
- g. Maintenance excavation will be in accordance with an approved maintenance plan and will not exceed the original contours of the facility as approved and constructed; and
- h. The discharge is part of a single and complete project. (**Section 404**)

Nationwide Permit 43 Specific Regional Condition

1. This authorization is not available for new stormwater management facilities.
2. The regulated activity cannot cause the loss of areas classified as bogs or fens, as determined by the Buffalo District Corps of Engineers.

New York State Water Quality Certification for Nationwide Permit 43: Pursuant to Section 401 of the Clean Water Act and 6NYCRR Part 608.9, the New York State Department of Environmental Conservation has certified that activities authorized by this NWP will comply with the applicable provisions of the Clean Water Act and applicable New York State water quality standards.

New York State Department of State (NYSDOS), Coastal Zone Management. For Nationwide Permits 43, the following conditions shall apply in the following State and Federally approved special management areas of the State CMP:

- a) areas covered by a Regional Coastal Management Program (CMP);
- b) areas covered by Local Waterfront Revitalization Programs (LWRP);
- c) areas within State designated Significant Coastal Fish and Wildlife Habitats;
- d) areas covered by Harbor Management Plans; and,
- e) areas within a State designated Scenic Area of Statewide Significance;

Activities may not be authorized under Nationwide Permit 43 until :

1. NYSDOS receives a complete copy of a joint Corps of Engineers and New York State Department of Environmental Conservation permit application, a completed Federal Consistency Assessment Form (FCAF), and all necessary supporting information and data;
2. NYSDOS is advised by the Corps that the proposed activity is eligible for authorization under Nationwide Permit 43; and,
3. NYSDOS indicates, within 30 days of receipt of all of the above, either: a) that further review by NYSDOS and concurrence with the applicant's consistency certification is not necessary; or b) that a full consistency review of the proposed activity and the applicant's consistency certification is necessary or has been completed, and NYSDOS concurs with the applicant's consistency certification after completing that review.

44. Mining Activities.

1. The Buffalo District has revoked this Nationwide Permit.

C. NATIONWIDE PERMIT GENERAL CONDITIONS

The following general conditions must be followed in order for any authorization by an NWP to be valid:

- 1. Navigation.** No activity may cause more than a minimal adverse effect on navigation.
- 2. Proper Maintenance.** Any structure or fill authorized shall be properly maintained, including maintenance to ensure public safety.
- 3. Soil Erosion and Sediment Controls.** Appropriate soil erosion and sediment controls must be used and maintained in effective operating condition during construction, and all exposed soil and other fills, as well as any work below the ordinary high water mark or high tide line, must be permanently stabilized at the earliest practicable date.
- 4. Aquatic Life Movements.** No activity may substantially disrupt the movement of those species of aquatic life indigenous to the waterbody, including those species which normally migrate through the area, unless the activity's primary purpose is to impound water. Culverts placed in streams must be installed to maintain low flow conditions.
- 5. Equipment.** Heavy equipment working in wetlands must be placed on mats, or other measures must be taken to minimize soil disturbance.
- 6. Regional and Case-By-Case Conditions.** The activity must comply with any regional conditions which may have been added by the division engineer (see 33 CFR 330.4(e)) and with any case specific conditions added by the Corps or by the State or tribe in its Section 401 water quality certification and Coastal Zone Management Act consistency determination.
- 7. Wild and Scenic Rivers.** No activity may occur in a component of the National Wild and Scenic River System; or in a river officially designated by Congress as a "study river" for possible inclusion in the system, while the river is in an official study status; unless the appropriate Federal agency, with direct management responsibility for such river, has determined in writing that the proposed activity will not adversely affect the Wild and Scenic River designation, or study status. Information on Wild and Scenic Rivers may be obtained from the appropriate Federal land management agency in the area (e.g., National Park Service, U.S. Forest Service, Bureau of Land Management, U.S. Fish and Wildlife Service).
- 8. Tribal Rights.** No activity or its operation may impair reserved tribal rights, including, but not limited to, reserved

water rights and treaty fishing and hunting rights.

9. Water Quality.

(a) In certain States and tribal lands an individual 401 water quality certification must be obtained or waived (See 33 CFR 330.4(c)).

(b) For NWP 12, 14, 17, 18, 32, 39, 40, 42, 43, and 44, where the State or tribal 401 certification (either generically or individually) does not require or approve a water quality management plan, the permittee must include design criteria and techniques that will ensure that the authorized work does not result in more than minimal degradation of water quality. An important component of a water quality management plan includes stormwater management that minimizes degradation of the downstream aquatic system, including water quality. Refer to General Condition 21 for stormwater management requirements. Another important component of a water quality management plan is the establishment and maintenance of vegetated buffers next to open waters, including streams. Refer to General Condition 19 for vegetated buffer requirements for the NWPs.

10. Coastal Zone Management. In certain states, an individual state coastal zone management consistency concurrence must be obtained or waived (see Section 330.4(d)).

11. Endangered Species.

(a) No activity is authorized under any NWP which is likely to jeopardize the continued existence of a threatened or endangered species or a species proposed for such designation, as identified under the Federal Endangered Species Act, or which will destroy or adversely modify the critical habitat of such species. Non-federal permittees shall notify the District Engineer if any listed species or designated critical habitat might be affected or is in the vicinity of the project, or is located in the designated critical habitat and shall not begin work on the activity until notified by the District Engineer that the requirements of the Endangered Species Act have been satisfied and that the activity is authorized. For activities that may affect Federally-listed endangered or threatened species or designated critical habitat, the notification must include the name(s) of the endangered or threatened species that may be affected by the proposed work or that utilize the designated critical habitat that may be affected by the proposed work. As a result of formal or informal consultation with the FWS or NMFS, the District Engineer may add species-specific regional endangered species conditions to the NWPs.

(b) Authorization of an activity by a nationwide permit does not authorize the "take" of a threatened or endangered species as defined under the Federal Endangered Species Act. In the absence of separate authorization (e.g., an ESA Section 10 Permit, a Biological Opinion with "incidental take" provisions, etc.) from the U.S. Fish and Wildlife Service or the National Marine Fisheries Service, both lethal and non-lethal "takes" of protected species are in violation of the Endangered Species Act. Information on the location of threatened and endangered species and their critical habitat can be obtained directly from the offices of the U.S. Fish and Wildlife Service and National Marine Fisheries Service or their World Wide Web pages at <http://www.fws.gov/r9endspp/endspp.html> and http://www.nfms.gov/prot_res/esahome.html, respectively.

12. Historic Properties. No activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR part 325, Appendix C. The prospective permittee must notify the District Engineer if the authorized activity may affect any historic properties listed, determined to be eligible, or which the prospective permittee has reason to believe may be eligible for listing on the National Register of Historic Places, and shall not begin the activity until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. Information on the location and existence of historic resources can be obtained from the State Historic Preservation Office and the National Register of Historic Places (see 33 CFR 330.4(g)). For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the notification must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

13. Notification.

(a) Timing: Where required by the terms of the NWP, the prospective permittee must notify the District Engineer with a preconstruction notification (PCN) as early as possible. The District Engineer must determine if the PCN is complete within 30 days of the date of receipt and can request the additional information necessary to make the PCN complete only once. However, if the prospective permittee does not provide all of the requested information, then the District Engineer will notify the prospective permittee that the PCN is still incomplete and the PCN review process will not commence until all of the requested information has been received by the District Engineer. The prospective permittee shall not begin the activity:

(1) Until notified in writing by the District Engineer that the activity may proceed under the NWP with any special conditions imposed by the District or Division Engineer; or

(2) If notified in writing by the District or Division Engineer that an individual permit is required; or

(3) Unless 45 days have passed from the District Engineer's receipt of the complete notification and the prospective permittee has not received written notice from the District or Division Engineer. Subsequently, the permittee's right to proceed under the NWP may be modified, suspended, or revoked only in accordance with the procedure set forth in 33 CFR 330.5(d)(2).

(b) Contents of Notification: The notification must be in writing and include the following information:

(1) Name, address, and telephone numbers of the prospective permittee;

(2) Location of the proposed project;

(3) Brief description of the proposed project; the project's purpose; direct and indirect adverse environmental effects the project would cause; any other NWP(s), regional general permit(s), or individual permit(s) used or intended to be used to authorize any part of the proposed project or any related activity; and

(4) For NWPs 7, 12, 14, 18, 21, 34, 38, 39, 40, 41, 42, and 43, the PCN must also include a delineation of affected special aquatic sites, including wetlands, vegetated shallows (e.g., submerged aquatic vegetation, seagrass beds), and riffle and pool complexes (see paragraph 13(f));

(5) For NWP 7, Outfall Structures and Maintenance, the PCN must include information regarding the original design capacities and configurations of those areas of the facility where maintenance dredging or excavation is proposed.

(6) For NWP 14, Linear Transportation Crossings, the PCN must include a compensatory mitigation proposal to offset permanent losses of waters of the United States and a statement describing how temporary losses of waters of the United States will be minimized to the maximum extent practicable.

(7) For NWP 21, Surface Coal Mining Activities, the PCN must include an Office of Surface Mining (OSM) or state-approved mitigation plan.

(8) For NWP 27, Stream and Wetland Restoration, the PCN must include documentation of the prior condition of the site that will be reverted by the permittee.

(9) For NWP 29, Single-Family Housing, the PCN must also include:

(i) Any past use of this NWP by the individual permittee and/or the permittee's spouse;

(ii) A statement that the single-family housing activity is for a personal residence of the permittee;

(iii) A description of the entire parcel, including its size, and a delineation of wetlands. For the purpose of this NWP, parcels of land measuring 1/4 acre or less will not require a formal on-site delineation. However, the applicant shall provide an indication of where the wetlands are and the amount of wetlands that exists on the property. For parcels greater than 1/4 acre in size, a formal wetland delineation must be prepared in accordance with the current method required by the Corps. (See paragraph 13(f));

(iv) A written description of all land (including, if available, legal descriptions) owned by the prospective permittee and/or the prospective permittee's spouse, within a one mile radius of the parcel, in any form of ownership (including any land owned as a partner, corporation, joint tenant, co-tenant, or as a tenant-by-the-entirety) and any land on which a purchase and sale agreement or other contract for sale or purchase has been executed;

(10) For NWP 31, Maintenance of Existing Flood Control Projects, the prospective permittee must either notify the District Engineer with a PCN prior to each maintenance activity or submit a five year (or less) maintenance plan. In addition, the PCN must include all of the following:

(i) Sufficient baseline information so as to identify the approved channel depths and configurations and existing facilities. Minor deviations are authorized, provided the approved flood control protection or drainage is not increased;

(ii) A delineation of any affected special aquatic sites, including wetlands; and,

(iii) Location of the dredged material disposal site.

(11) For NWP 33, Temporary Construction, Access, and Dewatering, the PCN must also include a restoration plan of reasonable measures to avoid and minimize adverse effects to aquatic resources.

(12) For NWP 39, 43, and 44, the PCN must also include a written statement to the District Engineer explaining how avoidance and minimization of losses of waters of the United States were achieved on the project site.

(13) For NWP 39, Residential, Commercial, and Institutional Developments, and NWP 42, Recreational Facilities, the PCN must include a compensatory mitigation proposal that offsets unavoidable losses of waters of the United States or justification explaining why compensatory mitigation should not be required.

(14) For NWP 40, Agricultural Activities, the PCN must include a compensatory mitigation proposal to offset losses of waters of the United States.

(15) For NWP 43, Stormwater Management Facilities, the PCN must include, for the construction of new stormwater management facilities, a maintenance plan (in accordance with State and local requirements, if applicable) and a compensatory mitigation proposal to offset losses of waters of the United States.

(16) For NWP 44, Mining Activities, the PCN must include a description of all waters of the United States adversely affected by the project, a description of measures taken to minimize adverse effects to waters of the United States, a description of measures taken to comply with the criteria of the NWP, and a reclamation plan (for aggregate mining activities in isolated waters and non-tidal wetlands adjacent to headwaters and any hard rock/mineral mining activities).

(17) For activities that may adversely affect Federally-listed endangered or threatened species, the PCN must include the name(s) of those endangered or threatened species that may be affected by the proposed work or utilize the designated critical habitat that may be affected by the proposed work.

(18) For activities that may affect historic properties listed in, or eligible for listing in, the National Register of Historic Places, the PCN must state which historic property may be affected by the proposed work or include a vicinity map indicating the location of the historic property.

(19) For NWPs 12, 14, 29, 39, 40, 42, 43, and 44, where the proposed work involves discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within 100-year floodplains (as identified on FEMA's Flood Insurance Rate Maps or FEMA-approved local floodplain maps), the notification must include documentation demonstrating that the proposed work complies with the appropriate FEMA or FEMA-approved local floodplain construction requirements.

(c) Form of Notification: The standard individual per application form (Form ENG 4345) may be used as the notification but must clearly indicate that it is a PCN and must include all of the information required in (b) (1)-(19) of General Condition 13. A letter containing the requisite information may also be used.

(d) District Engineer's Decision: In reviewing the PCN for the proposed activity, the District Engineer will determine whether the activity authorized by the NWP will result in more than minimal individual or cumulative adverse environmental effects or may be contrary to the public interest. The prospective permittee may, optionally, submit a proposed mitigation plan with the PCN to expedite the process and the District Engineer will consider any proposed compensatory mitigation the applicant has included in the proposal in determining whether the net adverse environmental effects to the aquatic environment of the proposed work are minimal. If the District Engineer determines that the activity complies with the terms and conditions of the NWP and that the adverse effects on the aquatic environment are minimal, the District Engineer will notify the permittee and include any conditions the District Engineer deems necessary. Any compensatory mitigation proposal must be approved by the District Engineer prior to commencing work. If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed. If the prospective permittee elects to submit a compensatory mitigation plan with the PCN, the District Engineer will expeditiously review the proposed compensatory mitigation plan. The District Engineer must review the plan within 45 days of receiving a complete PCN and determine whether the conceptual or specific proposed mitigation would ensure no more than minimal adverse effects on the aquatic environment. If the net adverse effects of the project on the aquatic environment (after consideration of the compensatory mitigation proposal) are determined by the District Engineer to be minimal, the District Engineer will provide a timely written response to the applicant stating that the project can proceed under the terms and conditions of the nationwide permit. If the District Engineer determines that the adverse effects of the proposed work are more than minimal, then he will notify the applicant either:

(1) That the project does not qualify for authorization under the NWP and instruct the applicant on the procedures to seek authorization under an individual permit; (2) that the project is authorized under the NWP subject to the applicant's submission of a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level; or (3) that the project is authorized under the NWP with specific modifications or conditions. Where the District Engineer determines that mitigation is required in order to ensure no more than minimal adverse effects on the aquatic environment, the activity will be authorized within the 45-day PCN period, including the necessary conceptual or specific mitigation or a requirement that the applicant submit a mitigation proposal that would reduce the adverse effects on the aquatic environment to the minimal level. When conceptual mitigation is included, or a mitigation plan is required under item (2) above, no work in waters of the United States will occur until the District Engineer has approved a specific mitigation plan.

(e) Agency Coordination: The District Engineer will consider any comments from federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse effects on the aquatic environment to a minimal level. For activities requiring notification to the District Engineer that result in the loss of greater than 1/2 acre of waters of the United States, the District Engineer will, upon receipt of a notification, provide immediately (e.g., via facsimile transmission, overnight mail, or other expeditious manner), a copy to the appropriate offices of the Fish and Wildlife Service, State natural resource or water quality agency, EPA, State Historic Preservation Officer (SHPO), and, if appropriate, the National Marine Fisheries Service. With the exception of NWP 37, these agencies will then have 10 calendar days from the date the material is transmitted to telephone or fax the District Engineer notice that they intend to provide substantive, site-specific comments. If so contacted by an agency, the District Engineer will wait an additional 15 calendar days before making a decision on the notification. The District Engineer will fully consider agency comments received within the specified time frame, but will provide no response to the resource agency, except as provided below. The District Engineer will indicate in the administrative record associated with each notification that the resource agencies' concerns were considered. As required by Section 305(b)(4)(B) of the Magnuson-Stevens Fishery Conservation and Management Act, the District Engineer will provide a response to National Marine Fisheries Service within 30 days of receipt of any Essential Fish Habitat conservation recommendations. Applicants are encouraged to provide the Corps multiple copies of notifications to expedite agency notification.

(f) Wetland Delineations: Wetland delineations must be prepared in accordance with the current method required by the Corps. For NWP 29 see paragraph (b)(9)(iii) for parcels less than 1/4 acre in size. The permittee may ask the Corps to delineate the special aquatic site. There may be some delay if the Corps does the delineation. Furthermore, the 45-day period will not start until the wetland delineation has been completed and submitted to the Corps, where appropriate.

14. Compliance Certification. Every permittee who has received a Nationwide permit verification from the Corps will submit a signed certification regarding the completed work and any required mitigation. The certification will be forwarded by the Corps with the authorization letter. The certification will include: (a) A statement that the authorized work was done in accordance with the Corps authorization, including any general or specific conditions; (b) A statement that any required mitigation was completed in accordance with the permit conditions; and (c) The signature of the permittee certifying the completion of the work and mitigation.

15. Use of Multiple Nationwide Permits. The use of more than one NWP for a single and complete project is prohibited, except when the acreage loss of waters of the United States authorized by the NWPs does not exceed the acreage limit of the NWP with the highest specified acreage limit. For example, if a road crossing over tidal waters is constructed under NWP 14, with associated bank stabilization authorized by NWP 13, the maximum acreage loss of waters of the United States for the total project cannot exceed 1/3 acre.

16. Water Supply Intakes. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in the proximity of a public water supply intake except where the activity is for repair of the public water supply intake structures or adjacent bank stabilization.

17. Shellfish Beds. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may occur in areas of concentrated shellfish populations, unless the activity is directly related to a shellfish harvesting activity authorized by NWP 4.

18. Suitable Material. No activity, including structures and work in navigable waters of the United States or discharges of dredged or fill material, may consist of unsuitable material (e.g., trash, debris, car bodies, asphalt, etc.) and material used for construction or discharged must be free from toxic pollutants in toxic amounts (see Section 307 of the Clean Water Act).

19. Mitigation. The project must be designed and constructed to avoid and minimize adverse effects to waters of the United States to the maximum extent practicable at the project site (i.e., on site). Mitigation will be required when necessary to ensure that the adverse effects to the aquatic environment are minimal. The District Engineer will consider the factors

discussed below when determining the acceptability of appropriate and practicable mitigation necessary to offset adverse effects on the aquatic environment that are more than minimal.

(a) Compensatory mitigation at a minimum 1:1 ratio will be required for all wetland impacts requiring a PCN. Consistent with National policy, the District Engineer will establish a preference for restoration of wetlands to meet the minimum compensatory mitigation ratio, with preservation used only in exceptional circumstances.

(b) To be practicable, the mitigation must be available and capable of being done considering costs, existing technology, and logistics in light of the overall project purposes. Examples of mitigation that may be appropriate and practicable include, but are not limited to: reducing the size of the project; establishing and maintaining wetland or upland vegetated buffers to protect open waters such as streams; and replacing losses of aquatic resource functions and values by creating, restoring, enhancing, or preserving similar functions and values, preferably in the same watershed;

(c) The District Engineer will require restoration, creation, enhancement, or preservation of other aquatic resources in order to offset the authorized impacts to the extent necessary to ensure that the adverse effects on the aquatic environment are minimal. An important element of any compensatory mitigation plan for projects in or near streams or other open waters is the establishment and maintenance, to the maximum extent practicable, of vegetated buffers next to open waters on the project site. The vegetated buffer should consist of native species. The District Engineer will determine the appropriate width of the vegetated buffer and in which cases it will be required. Normally, the vegetated buffer will be 25 to 50 feet wide on each side of the stream, but the District Engineer may require wider vegetated buffers to address documented water quality concerns. If there are open waters on the project site and the District Engineer requires compensatory mitigation for wetland impacts to ensure that the net adverse effects on the aquatic environment are minimal, any vegetated buffer will comprise no more than 1/3 of the remaining compensatory mitigation acreage after the permanently filled wetlands have been replaced on a one-to-one acreage basis. In addition, compensatory mitigation must address adverse effects on wetland functions and values and cannot be used to offset the acreage of wetland losses that would occur in order to meet the acreage limits of some of the NWPs (e.g., for NWP 39, 1/4 acre of wetlands cannot be created to change a 1/2 acre loss of wetlands to a 1/4 acre loss; however, 1/2 acre of created wetlands can be used to reduce the impacts of a 1/3 acre loss of wetlands). If the prospective permittee is required to submit a compensatory mitigation proposal with the PCN, the proposal may be either conceptual or detailed.

(d) To the extent appropriate, permittees should consider mitigation banking and other appropriate forms of compensatory mitigation. If the District Engineer determines that compensatory mitigation is necessary to offset losses of waters of the United States and ensure that the net adverse effects of the authorized work on the aquatic environment are minimal, consolidated mitigation approaches, such as mitigation banks, will be the preferred method of providing compensatory mitigation, unless the District Engineer determines that activity-specific compensatory mitigation is more appropriate, based on which is best for the aquatic environment. These types of mitigation are preferred because they involve larger blocks of protected aquatic environment, are more likely to meet the mitigation goals, and are more easily checked for compliance. If a mitigation bank or other consolidated mitigation approach is not available in the watershed, the District Engineer will consider other appropriate forms of compensatory mitigation to offset the losses of waters of the United States to ensure that the net adverse effects of the authorized work on the aquatic environment are minimal.

20. Spawning Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, in spawning areas during spawning seasons must be avoided to the maximum extent practicable. Activities that result in the physical destruction (e.g., excavate, fill, or smother downstream by substantial turbidity) of an important spawning area are not authorized.

21. Management of Water Flows To the maximum extent practicable, the activity must be designed to maintain preconstruction downstream flow conditions (e.g., location, capacity, and flow rates). Furthermore, the activity must not permanently restrict or impede the passage of normal or expected high flows (unless the primary purpose of the fill is to impound waters) and the structure or discharge of dredged or fill material must withstand expected high flows. The activity must, to the maximum extent practicable, provide for retaining excess flows from the site, provide for maintaining surface flow rates from the site similar to preconstruction conditions, and must not increase water flows from the project site, relocate water, or redirect water flow beyond preconstruction conditions. In addition, the activity must, to the maximum extent practicable, reduce adverse effects such as flooding or erosion downstream and upstream of the project site, unless the activity is part of a larger system designed to manage water flows.

22. Adverse Effects From Impoundments. If the activity, including structures and work in navigable waters of the United States or discharge of dredged or fill material, creates an impoundment of water, adverse effects on the aquatic system caused by the accelerated passage of water and/or the restriction of its flow shall be minimized to the maximum extent practicable.

23. Waterfowl Breeding Areas. Activities, including structures and work in navigable waters of the United States or discharges of dredged or fill material, into breeding areas for migratory waterfowl must be avoided to the maximum extent practicable.

24. Removal of Temporary Fills. Any temporary fills must be removed in their entirety and the affected areas returned to their preexisting elevation.

25. Designated Critical Resource Waters. Critical resource waters include, NOAA-designated marine sanctuaries, National Estuarine Research Reserves, National Wild and Scenic Rivers, critical habitat for Federally listed threatened and endangered species, coral reefs, State natural heritage sites, and outstanding national resource waters or other waters officially designated by a State as having particular environmental or ecological significance and identified by the District Engineer after notice and opportunity for public comment. The District Engineer may also designate additional critical resource waters after notice and opportunity for comment.

(a) Except as noted below, discharges of dredged or fill material into waters of the United States are not authorized by NWPs 7, 12, 14, 16, 17, 21, 29, 31, 35, 39, 40, 42, 43, and 44 for any activity within, or directly affecting, critical resource waters, including wetlands adjacent to such waters. Discharges of dredged or fill materials into waters of the United States may be authorized by the above NWPs in National Wild and Scenic Rivers if the activity complies with General Condition 7. Further, such discharges may be authorized in designated critical habitat for Federally listed threatened or endangered species if the activity complies with General Condition 11 and the U.S. Fish and Wildlife Service or the National Marine Fisheries Service has concurred in a determination of compliance with this condition.

(b) For NWPs 3, 8, 10, 13, 15, 18, 19, 22, 23, 25, 27, 28, 30, 33, 34, 36, 37, and 38, notification is required in accordance with General Condition 13, for any activity proposed in the designated critical resource waters including wetlands adjacent to those waters. The District Engineer may authorize activities under these NWPs only after he determines that the impacts to the critical resource waters will be no more than minimal.

26. Fills Within 100-Year Floodplains. For purposes of this general condition, 100-year floodplains will be identified through the Federal Emergency Management Agency's (FEMA) Flood Insurance Rate Maps or FEMA-approved local floodplain maps.

(a) Discharges Below Headwaters. Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the 100-year floodplain at or below the point on a stream where the average annual flow is five cubic feet per second (i.e., below headwaters) are not authorized by NWPs 29, 39, 40, 42, 43, and 44. For NWPs 12 and 14, the prospective permittee must notify the District Engineer in accordance with General Condition 13 and the notification must include documentation that any permanent, above-grade fills in waters of the United States within the 100-year floodplain below headwaters comply with FEMA or FEMA-approved local floodplain construction requirements.

(b) Discharges in Headwaters (i.e., above the point on a stream where the average annual flow is five cubic feet per second).

(1) Flood Fringe. Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the flood fringe of the 100-year floodplain of headwaters are not authorized by NWPs 12, 14, 29, 39, 40, 42, 43, and 44, unless the prospective permittee notifies the District Engineer in accordance with General Condition 13. The notification must include documentation that such discharges comply with FEMA or FEMA-approved local floodplain construction requirements.

(2) Floodway. Discharges of dredged or fill material into waters of the United States resulting in permanent, above-grade fills within the floodway of the 100-year floodplain of headwaters are not authorized by NWPs 29, 39, 40, 42, 43, and 44. For NWPs 12 and 14, the permittee must notify the District Engineer in accordance with General Condition 13 and the notification must include documentation that any permanent, above grade fills proposed in the floodway comply with FEMA or FEMA-approved local floodplain construction requirements.

D. Further Information

District engineers have authority to determine if an activity complies with the terms and conditions of an NWP. NWPs do not obviate the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law.

NWPs do not grant any property rights or exclusive privileges.

NWPs do not authorize any injury to the property or rights of others.
NWPs do not authorize interference with any existing or proposed Federal project.

E. Definitions

Best management practices: Best Management Practices (BMPs) are policies, practices, procedures, or structures implemented to mitigate the adverse environmental effects on surface water quality resulting from development. BMPs are categorized as structural or non-structural. A BMP policy may affect the limits on a development.

Compensatory mitigation: For purposes of Section 10/404, compensatory mitigation is the restoration, creation, enhancement, or in exceptional circumstances, preservation of wetlands and/or other aquatic resources for the purpose of compensating for unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

Creation: The establishment of a wetland or other aquatic resource where one did not formerly exist.

Enhancement: Activities conducted in existing wetlands or other aquatic resources which increase one or more aquatic functions.

Ephemeral stream: An ephemeral stream has flowing water only during, and for a short duration after, precipitation events in a typical year. Ephemeral streambeds are located above the water table year-round. Groundwater is not a source of water for the stream. Runoff from rainfall is the primary source of water for stream flow.

Farm tract: A unit of contiguous land under one ownership which is operated as a farm or part of a farm.

Flood Fringe: That portion of the 100-year floodplain outside of the floodway (often referred to as "floodway fringe."

Floodway: The area regulated by Federal, state, or local requirements to provide for the discharge of the base flood so the cumulative increase in water surface elevation is no more than a designated amount (not to exceed one foot as set by the National Flood Insurance Program) within the 100-year floodplain.

Independent utility: A test to determine what constitutes a single and complete project in the Corps regulatory program. A project is considered to have independent utility if it would be constructed absent the construction of other projects in the project area. Portions of a multi-phase project that depend upon other phases of the project do not have independent utility. Phases of a project that would be constructed even if the other phases are not built can be considered as separate single and complete projects with independent utility.

Intermittent stream: An intermittent stream has flowing water during certain times of the year, when groundwater provides water for stream flow. During dry periods, intermittent streams may not have flowing water. Runoff from rainfall is a supplemental source of water for stream flow.

Loss of waters of the United States: Waters of the United States that include the filled area and other waters that are permanently adversely affected by flooding, excavation, or drainage as a result of the regulated activity. Permanent adverse effects include permanent above-grade, at-grade, or below-grade fills that change an aquatic area to dry land, increase the bottom elevation of a waterbody, or change the use of a waterbody. The acreage of loss of waters of the United States is the threshold measurement of the impact to existing waters for determining whether a project may qualify for an NWP; it is not a net threshold that is calculated after considering compensatory mitigation that may be used to offset losses of aquatic functions and values. The loss of streambed includes the linear feet of streambed that is filled or excavated. Waters of the United States temporarily filled, flooded, excavated, or drained, but restored to preconstruction contours and elevations after construction, are not included in the measurement of loss of waters of the United States.

Non-tidal wetland: A non-tidal wetland is a wetland (i.e., a water of the United States) that is not subject to the ebb and flow of tidal waters. The definition of a wetland can be found at 33 CFR 328.3(b). Non-tidal wetlands contiguous to tidal waters are located landward of the high tide line (i.e., the spring high tide line).

Open water: An area that, during a year with normal patterns of precipitation, has standing or flowing water for sufficient duration to establish an ordinary high water mark. Aquatic vegetation within the area of standing or flowing water is either non-emergent, sparse, or absent. Vegetated shallows are considered to be open waters. The term "open water" includes rivers, streams, lakes, and ponds. For the purposes of the NWPs, this term does not include ephemeral waters.

Perennial stream: A perennial stream has flowing water year-round during a typical year. The water table is located above the streambed for most of the year. Groundwater is the primary source of water for stream flow. Runoff from rainfall is a supplemental source of water for stream flow.

Permanent above-grade fill: A discharge of dredged or fill material into waters of the United States, including wetlands, that results in a substantial increase in ground elevation and permanently converts part or all of the waterbody to dry land. Structural fills authorized by NWPs 3, 25, 36, etc. are not included.

Preservation: The protection of ecologically important wetlands or other aquatic resources in perpetuity through the implementation of appropriate legal and physical mechanisms. Preservation may include protection of upland areas adjacent to wetlands as necessary to ensure protection and/or enhancement of the overall aquatic ecosystem.

Restoration: Re-establishment of wetland and/or other aquatic resource characteristics and function(s) at a site where they have ceased to exist, or exist in a substantially degraded state.

Riffle and pool complex: Riffle and pool complexes are special aquatic sites under the 404(b)(1) Guidelines. Steep gradient sections of streams are sometimes characterized by riffle and pool complexes. Such stream sections are recognizable by their hydraulic characteristics. The rapid movement of water over a coarse substrate in riffles results in a rough flow, a turbulent surface, and high dissolved oxygen levels in the water. Pools are deeper areas associated with riffles. Pools are characterized by a slower stream velocity, a streaming flow, a smooth surface, and a finer substrate.

Single and complete project: The term "single and complete project" is defined at 33 CFR 330.2(i) as the total project proposed or accomplished by one owner/developer or partnership or other association of owners/developers (see definition of independent utility). For linear projects, the "single and complete project" (i.e., a single and complete crossing) will apply to each crossing of a separate water of the United States (i.e., a single waterbody) at that location. An exception is for linear projects crossing a single waterbody several times at separate and distant locations: each crossing is considered a single and complete project. However, individual channels in a braided stream or river, or individual arms of a large, irregularly shaped wetland or lake, etc., are not separate waterbodies.

Stormwater management: Stormwater management is the mechanism for controlling stormwater runoff for the purposes of reducing downstream erosion, water quality degradation, and flooding and mitigating the adverse effects of changes in land use on the aquatic environment.

Stormwater management facilities: Stormwater management facilities are those facilities, including but not limited to, stormwater retention and detention ponds and BMPs, which retain water for a period of time to control runoff and/or improve the quality (i.e., by reducing the concentration of nutrients, sediments, hazardous substances and other pollutants) of stormwater runoff.

Stream bed: The substrate of the stream channel between the ordinary high water marks. The substrate may be bedrock or inorganic particles that range in size from clay to boulders. Wetlands contiguous to the streambed, but outside of the ordinary high water marks, are not considered part of the streambed.

Stream channelization: The manipulation of a stream channel to increase the rate of water flow through the stream channel.

Manipulation may include deepening, widening, straightening, armoring, or other activities that change the stream cross-section or other aspects of stream channel geometry to increase the rate of water flow through the stream channel. A channelized stream remains a water of the United States, despite the modifications to increase the rate of water flow.

Tidal wetland: A tidal wetland is a wetland (i.e., a water of the United States) that is inundated by tidal waters. The definitions of a wetland and tidal waters can be found at 33 CFR 328.3(b) and 33 CFR 328.3(f), respectively. Tidal waters rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by other waters, wind, or other effects. Tidal wetlands are located channelward of the high tide line (i.e., spring high tide line) and are inundated by tidal waters two times per lunar month, during spring high tides.

Vegetated buffer: A vegetated upland or wetland area next to rivers, streams, lakes, or other open waters which separates the open water from developed areas, including agricultural land. Vegetated buffers provide a variety of aquatic habitat functions and values (e.g., aquatic habitat for fish and other aquatic organisms, moderation of water temperature changes, and detritus for aquatic food webs) and help improve or maintain local water quality. A vegetated buffer can be established by maintaining an existing vegetated area or planting native trees, shrubs, and herbaceous plants on land next to open waters. Mowed lawns are not considered vegetated buffers because they provide little or no aquatic habitat functions and values. The establishment and maintenance of vegetated buffers is a method of compensatory mitigation that can be used in conjunction with the restoration, creation, enhancement, or preservation of aquatic habitats to ensure that activities authorized by NWPs result in minimal adverse effects to the aquatic environment. (See General Condition 19).

Vegetated shallows: Vegetated shallows are special aquatic sites under the 404(b)(1) Guidelines. They are areas that are permanently inundated and under normal circumstances have rooted aquatic vegetation, such as seagrasses in marine and

estuarine systems and a variety of vascular rooted plants in freshwater systems.

Waterbody: A waterbody is any area that in a normal year has water flowing or standing above ground to the extent that evidence of an ordinary high water mark is established. Wetlands contiguous to the waterbody are considered part of the waterbody.

F. REGIONAL-SPECIFIC CONDITIONS:

1. The prospective permittee must notify the District Engineer in accordance with the "Notification" general condition for any discharges subject to Nationwide Permits 39 and 42, into the following waters of the United States:

Cayuga County

- o Bear Swamp, Town of Sempronius
- o Montezuma Wetlands, Towns of Conquest and Montezuma

Chautauqua County

- o Alder Bottom Swamp, Towns of Sherman and Clymer

Cortland County

- o Beaver Brook fens, Cortland marl ponds and Chicago Bog, Town of Cortlandville

Jefferson County

- o Adams Swamp, Town of Adams
- o Johnny Cake Road Sinkholes, Town of Cape Vincent

Lewis County

- o Blue Swamp, Town of Croghan
- o Bonaparte Swamp, Town of Diana
- o Carley Swamp, Town of Diana

Madison County

- o Fiddler's Green, Town of Eaton
- o Nelson Swamp, Towns of Cazenovia and Nelson

Monroe County

- o Thousand Acre Swamp, Town of Penfield

Niagara County

- o Klydel Wetland, Town of North Tonawanda

Oneida County

- o Rome Sand Plains wetlands, City of Rome

Ontario County

- o Honeoye Inlet wetlands, Towns of Canadice and Richmond

Oswego County

- o Regan's Silver Lake (aka Mud Pond Fen), Town of Oswego
- o North and South Pond and adjacent fens, Tug Hill Plateau, Town of Amboy
- o Boylston Tamarack Swamp, Town of Boylston
- o Fox Brook Swamp, Towns of Orwell and Redfield
- o Big Bay Swamp and Toad Harbor Swamp, Towns of Constantia and West Monroe

Seneca County

- o Junius Ponds, Town of Junius

Tompkins County

- o Fall Creek and Beaver Brook Fens, Towns of Dryden and Groton

Wayne County

- o Zurich Bog, Town of Arcadia

Wyoming County

- o Java Lake wetlands and Younger Road fens, Towns of Java and Arcade

2. If the proposed activity would take place within one of the following designated special management areas in the Coastal Zone of the State of New York, the applicant must obtain consistency certification concurrence from the New York State Department of State prior to the commencement of work:

1. Regional Coastal Management Programs;
2. Local Waterfront Revitalization Programs;
3. Significant Coastal Fish and Wildlife Habitats;
4. Outstanding Natural Coastal Areas;
5. Harbor Management Plans, and;
6. Areas for Concentrated Development.

Please contact the New York State Department of State at the following address for additional information on these special management areas:

N.Y.S Department of State
Division of Coastal Resources
& Waterfront Revitalization
41 State Street - 8th Floor
Albany, New York 12231-0001

G. Generally-Applicable Conditions

The Generally-Applicable Conditions apply to all modified, reissued, and new Nationwide Permits.

1. A PCN to Buffalo District is required for any in-water work or discharges of dredged or fill material in the following: Bergen Swamp and the western edge of Seneca Lake (Glenora Cliff Area). The Buffalo District will provide the U.S. Fish and Wildlife Service with a five (5) day review period in these areas to comment on effects on Federally listed threatened and endangered species. Permittees shall not commence work in these areas until notified by the District Engineer.

2. **Compensatory Mitigation Compliance Report:** For approved mitigation proposals, the permittee must submit evidence of the following listed actions to the Buffalo District Corps of Engineers when the mitigation has been completed.

1. Purchase of credits from a Corps-approved mitigation bank;
2. Acknowledgment of transfer of funds for In Lieu Fee Arrangements;
3. Recording of deed restrictive covenants;
4. Execution of conservation easements.

The permittee must submit such evidence before commencement of the authorized activity or within 60 days of issuance of the authorization letter by the Buffalo District Corps of Engineers, whichever is later. This reporting requirement does not waive or supersede the reporting requirements set forth in Nationwide General Permit General Condition No. 14.

3. **Construction Best Management Practices (BMP's):** Unless specifically approved otherwise, following review of a Pre-Construction Notification, the following BMP's must be implemented to the maximum degree practicable, to minimize erosion, migration of sediments, and adverse environmental impacts:

1. Mulch, hay bales, silt fences, or other means must be properly employed to minimize erosion and migration of sediments during construction. Temporary measures must be removed upon completion.
 2. Construction access shall be by means that avoid or minimize impacts to aquatic sites (e.g. upland access, floating barges, mats, etc.).
 3. All excess excavated material remaining on site must be properly contained and permanently stabilized to prevent erosion.
 4. Upon project completion, impacted land surfaces must be permanently stabilized to prevent erosion.
 5. Upon project completion, impacted aquatic sites must be restored to their original contours and conditions.
 6. All return flow shall not result in an increase in turbidity in the receiving waterbody that will cause a substantial visible contrast to natural conditions.
 7. No in-stream work shall occur during predicted periods of high flow.
4. No Nationwide Permit may be used in Lakes Erie or Ontario for purposes of diverting water from the Great Lakes.
5. For all proposals requiring a PCN, the applicant shall also include:
- i. a location map and project drawings on 8.5 by 11 inch paper;
 - ii. a description of the proposed construction practices that would be implemented to perform the proposed work and a description of the reasonably foreseeable direct and indirect effects to waters of the U.S. of the proposed construction practices.

H. Critical Resource Waters

1. **NOAA-Designated Marine Sanctuaries:** There are no NOAA-designated marine sanctuaries within the Buffalo District portion of New York State.

2. **National Estuarine Research Reserves (NERR):** There are no NERRs within the Buffalo District.

3. **National Wild and Scenic Rivers (NWSR):** The East Branch of Fish Creek has been designated as a NWSR in its entirety within Oneida and Lewis Counties, with a 1.9 mile exception, including Boyd Dam and the Tagasoke Reservoir.

4. **Critical Habitat for Federally Listed Threatened and Endangered Species:** Proposed designated critical habitat for the piping plover (*Charadrius melodus*) is defined as lands 0.62 miles inland from normal high water line from the mouth of the Salmon River, Oswego County, northward to Eldorado Road, Jefferson County, encompassing approximately 17 miles.

5. **State Natural Heritage Sites:** There are no areas designated as state natural heritage sites through a state legislative or regulatory process.

6. **Outstanding National Resource Waters or Other Waters Officially Designated by New York State:** As of this date, New York State has not proposed any such waters, and the Buffalo District is not proposing to add critical resource waters under this category.